

**THE FEDERAL-STATE CONFLICT OF LAWS:
“ACTUAL” CONFLICTS**
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I. Introduction	1744
A. <i>The Problem</i>	1744
B. <i>Toward Unified Theory</i>	1750
C. <i>Politics and Theory in Today’s Supreme Court</i>	1751
II. Two Broad Groupings	1753
A. <i>“Actual” Conflicts</i>	1753
B. <i>“Inchoate” Conflicts</i>	1754
III. A Unifying Conception	1755
A. <i>Interest Analysis and Federal-State Conflicts</i>	1755
B. <i>Interest Analysis and Interest Balancing</i>	1757
C. <i>Toward the Death of Conflicts</i>	1758
IV. The Dual-Law System and the Presumption Against Preemption	1759
V. Conflict Preemption: The Example of <i>ARC America</i>	1760
A. <i>The Relation of State Claims to Federal Claims</i>	1762
B. <i>Analyzing ARC America</i>	1764
1. <i>The Scenario in Federal Court</i>	1765
2. <i>The Scenario in Parallel Litigation</i>	1766
C. <i>On Departing from Federal Law</i>	1769
VI. Supremacy: The Example of <i>Howlett</i>	1773
A. <i>The “Otherwise Valid Excuse”</i>	1773
B. <i>“Discrimination” Against Federal Claims</i>	1776
C. <i>Choosing Sovereign Immunity Law</i>	1777
D. <i>The General Inutility of Supremacy Doctrine</i>	1778
1. <i>The Duty to Take a Federal Case</i>	1779
2. <i>The Part Policy Plays: Howlett and ARC America Compared</i>	1779
3. <i>The Part “Discrimination” Plays</i>	1781
4. <i>The Part State Interests Play, or, Rather, Do Not Play</i>	1783

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(1992) TEX. L. REV. 1744

VII. Reverse- <i>Erie</i> : The Example of <i>Monessen</i>	1784
A. <i>Federal Procedure in State Courts</i>	1784
B. <i>The Directions of National Policy</i>	1786
C. <i>Analyzing Monessen: Herein of Statutory</i>	
<i>Construction and Choice of Law</i>	1787
1. <i>The Zero-Discount Issue</i>	1788
2. <i>The Prejudgment Interest Issue</i>	1790
3. <i>An Apparent Conflict</i>	1795
VIII. Envoi	1796

I. Introduction

A. *The Problem*

My subject here is the clash, in all courts, between national and local substantive policies. Federal-state conflicts present federal questions, of course, and the Supreme Court is energetically providing answers.¹ That

1. The Supreme Court's current and recent cases on federal-state conflicts include, *inter alia*, *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) (holding that an act of Congress mandating warnings on cigarette packs and advertisements does not preempt state tort claims unrelated to duty to warn); *Wisconsin Pub. Intervenor v. Mortier*, 111 S.Ct. 2476 (1991) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt local governmental regulation of pesticide use); *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990) (deciding that the Employment Retirement Income Security Act of 1974 (ERISA) preempts an employee's state-law wrongful discharge claim when discharge is based on employer's desire to avoid making contributions to pension fund); *Howlett v. Rose*, 496 U.S. 356 (1990) (holding that, under Supremacy Clause, a state must entertain a federal civil rights claim against a school district, notwithstanding state law cloaking school district with sovereign immunity); *English v. General Electric Co.*, 496 U.S. 72 (1990) (holding that an employee's state-law claim for intentional infliction of emotional distress for alleged violations of nuclear safety law not is not preempted by the Energy Reorganization Act notwithstanding *Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) (preempting field of regulation of nuclear safety)); *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490 (1990) (holding that the Federal Power Act preempts state-law requirements for minimum stream flow for river on which federally licensed hydroelectric project was located, notwithstanding a saving clause in the Act); *United Steelworkers v. Rawson*, 495 U.S. 362 (1990) (holding that the Labor Management Relations Act preempts state-law claims of union negligence in inspection of mines).

means that today when courts try to resolve conflicts of governance between a state and the nation they have to deal with a vast federal common law of preemption, supremacy, and borrowed state law. All of this jurisprudence is special to the field. It has little resemblance to the Court's other conflicts jurisprudence²—or indeed, to any more general thinking about choice of law.

2. In international conflicts between federal law and the law of another sovereign, the Court currently uses quite manipulative statutory or constitutional construction, and sometimes uses a presumption against extraterritoriality. *See, e.g., EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227, 1232-34 (1991) (holding that Title VII does not protect American employees from discrimination by American employers which occurs abroad, and giving a strained reading to language in the act which apparently should have compelled a contrary result), *legislatively revised*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(b)(1), 105 Stat. 1071, 1077 (1992) (codified as amended at 42 U.S.C.A. § 2000e(f) (West Supp. 1992)); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that even in exercise of acknowledged extraterritorial criminal jurisdiction, the Fourth Amendment is without extraterritorial effect on the conduct of United States agents). For my views on *Aramco*, see Louise Weinberg, *Against Comity*, 80 GEORGETOWN L. J. 53, 73-75 (1991) [hereinafter Weinberg, *Against Comity*] (viewing *Aramco* as a false conflict, in which Saudi Arabia had no interest, and criticizing the case because of possible effects on American Jews and women working in the Middle East). For other current commentary see Jonathan Turley, "*When in Rome*": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990). For my views on *Verdugo-Urquidez*, see DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS 554, 556 (1990) (suggesting that the *Verdugo* court failed to do needed policy analysis).

The federal question in interstate conflicts cases is a constitutional question. When not arising under the Commerce Clause, it arises under the Due Process and Full Faith and Credit Clauses. In these cases the Court seems to be using minimal scrutiny for some rational basis. (The Court does not use this language itself; it is the formulation I offer in Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982) [hereinafter Weinberg, *Minimal Scrutiny*].) Rather, the Court states that, in order to apply its own law, a state must have a contact with the case, generating a governmental interest, such that application of its law will not be arbitrary or fundamentally unfair. This was the test the Court purported to apply in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1989) (holding under Due Process and Full Faith and Credit Clauses, state courts with only jurisdictional contacts with a case are free to apply their own longer statutes of limitations); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding, under the Due Process Clause, that courts are not free to apply forum law to every issue in complex litigation, but are required to apply law of relevant state on each issue); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (holding, under the Due Process Clause, that the after-acquired residence of the plaintiff could apply its own law to treble the liability of an insurer on an out-of-state policy for an out-of-state accident). For my views on *Wortman* and *Shutts*, see generally Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. OF ILL. L. REV. 683, 695-98 [hereinafter Weinberg, *Choosing Law*]; for

(1992) TEX. L. REV. 1745 The taxonomy is daunting. There are--bear with me--cases of *express preemption*,³ and, therefore, *implied preemption*, the latter **(1992) TEX. L. REV. 1746** including cases of so-called *conflict preemption*⁴ and of *field preemption*.⁵ And then there

my views on Hague, see generally Weinberg, *Minimal Scrutiny*, *supra*; Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time*, 10 HOFSTRA L. REV. 1023 (1984). For other commentary on Hague, see generally Symposium, *Conflict of Laws* (parts I & II), 34 MERCER L. REV. 471-808 (1983), 35 MERCER L. REV. 417-646 (1984). For my further remarks on *Hague* and *Shutts*, see Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 93-97 (1985) [hereinafter Weinberg, *Overhauling Constitutional Theory*]; and see generally VERNON ET AL., *supra*, at 411-471.

For my comments on interstate conflicts cases decided under the Commerce Clause, see *id.*, at 448-59; Weinberg, *Against Comity*, *supra*, at 411-71.

3. One of the more comprehensive modern examples is the preemption clause in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (1988). If a given issue does not fall within any of the Act's clauses saving state law, 29 U.S.C. §§ 1144(b)(2)(A), (b)(3), (b)(4), this clause expressly preempts state laws that simply "relate to" employee benefit plans. For recent examples, see *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990) (holding that ERISA preempts an employee's state-law action for wrongful discharge based on the employer's desire to avoid contributing to the employee's pension); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) (holding that ERISA preempts the district court's imposition of a constructive trust on the pension benefits of a former union official convicted of embezzling union funds). Express preemption cases depend on statutory interpretation not only of the preemption clause, but also the underlying statute. They may include "conflict preemption" and "field preemption" examples. See *infra* notes 4-5.

4. Conflict preemption is described, with other categories of preemption, in the leading discussion in *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). For cases see *infra* note 141.

5. See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (holding that federal statutory protection for copyrighted or patented intellectual property implies that states may not protect intellectual property otherwise within the public domain; Congress has struck the policy balance and occupied the field); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964) (describing the foreign relations of the United States as presenting an inherently and uniquely federal question; states may not speak to it even in the absence of conflict with federal policy); *Zchernig v. Miller*, 389 U.S. 429, 432 (1968) (prohibiting a state from intruding into foreign affairs by escheating land left to an alien whose country would not give reciprocal rights of inheritance); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (holding that the Smith Act completely preempts state sedition laws; the federal interest is so dominant that it must be assumed to preclude enforcement of state laws on the same subject); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that a comprehensive legislative scheme will suggest congressional intent to preempt state law).

seems to be an entirely separate class of cases of *supremacy*⁶ Besides all this, there are second-order doctrinal accretions--magic words. We find the nation doing baroque things like *striking the policy balance*,⁷ *occupying the field*,⁸ or *leaving the field unattended*.⁹ We find state law *standing as an obstacle*,¹⁰ or the state *discriminating against a federal cause of action*,¹¹ having an *otherwise valid excuse*,¹² or acting **(1992)**

6. The classic case is *Testa v. Katt*, 330 U.S. 386 (1947) (holding that state courts must hear federal causes of action not exclusively within federal jurisdiction). The recent case of importance is *Howlett v. Rose*, 110 S.Ct. 2430 (1990) (holding that a state court may not apply a sovereign immunity defense in actions under federal civil rights law).

7. *See, e.g.*, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25 (1978) (holding that Congress struck balance in Death on the High Seas Act; the federal common-law remedy for wrongful death in state territorial waters may not be extended to supplement remedies available under the Act for deaths on high seas); *Goldstein v. California*, 412 U.S. 546, 569-70 (1973) (“In regard to mechanical configuration, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition. . . . The application of state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution.”). For typical application of the concept that Congress strikes the balance in Commerce Clause cases, see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

8. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). For the Commerce Clause roots of notion, see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 168-69 (1942).

9. *See, e.g.*, *Goldstein v. California*, 412 U.S. 546, 570 (1973) (deciding that under the Copyright Act of 1909, Congress had not struck the balance with respect to the protection of intellectual property in sound recordings, but had simply left the field unattended; the state was therefore free to apply its criminal laws to piracy of sound recordings).

10. *See, e.g.*, *Wisconsin Pub. Intervenor v. Mortier*, 111 S.Ct. 2486, 2482 (1991); *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). For the Commerce Clause origin of doctrine, see *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

11. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 377-79 (1990); *Felder v. Case*, 487 U.S. 131, 139, 144 (1988); *Wilson v. Garcia*, 471 U.S. 261, 279 (1985); *Burnett v. Grattan*, 468 U.S. 42, 53 n. 15 (1984); *id.* at 60, 62 (Rehnquist, J., concurring).

12. *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 388 (1929).

TEX. L. REV. 1747 *outside the preempted field*.¹³ If the emperor is really wearing his clothes, why is he carrying so much baggage?

Theorists simply have not taken hold of the federal- state conflict of laws. There is very little theoretical writing in this field. Why should we not try to make some sense of it? Indeed, why not unify theory here with general choice of law theory?¹⁴

13. See, e.g., *English*, 496 U.S. at 84-85; *Silkwood*, 464 U.S. at 248; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983).

14. The standard model for choice of law today is interest analysis. Most American courts today--no matter what method they have formally adopted--will identify true conflicts by construing the law of the forum and other concerned states to see whether the likely policy purposes of the laws at issue would support application on the particular facts. Cf. RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS § 6(2)(b), (c) (1971) (stating that courts should consider interests of the forum and of other concerned states). For recent examples of interest analysis proper, see *Judge v. American Motors Corp.*, 908 F.2d 1565, 1572-74 (11th Cir. 1990); *Mahne v. Ford Motor Co.*, 900 F.2d 83, 87-89 (6th Cir. 1990).

Once a court identifies a true conflict (a case in which either state's law rationally could apply), there is a split of authority on what to do about it. The eclectic modern approach seems to be to apply "better" law, which is usually plaintiff-protective, defendant-detering, risk-spreading, or validating law. See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 195 (3d ed. 1977) (arguing that choice-influencing considerations include "the better rule of law"); cf. RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS § 6(2)(e) (commenting that factors relevant to the choice of the applicable rule of law include the policies underlying the whole field of law, but omitting the policies underlying the defense).

Some authorities would use the law of the place of conduct or injury as a tie-breaker in true conflicts of tort law. See the rules proposed by Chief Judge Fuld in *Neumeier v. Kuehner*, 286 N.E.2d 454, 457-58 (N.Y. 1972). Earlier authorities tended to favor the view that the interested forum should apply its own law, as in any event it generally does. See, e.g., U.C.C. §1-105 (1990) (stating that in the absence of a stipulation by the parties, the law that applies to commercial transactions with an appropriate relation to the forum is the law of the forum). The late Brainerd Currie took this position, but argued it only conclusorily. See Brainerd Currie, *Married Women's Contracts: A Study in Choice-of-Law Method*, 25 U. CHI. L. REV. 227, 261-62 (1958) (concluding that choosing forum law is the "sensible and clearly constitutional thing . . . to do" because at least forum law consistently advances forum policy; applying foreign law would advance another state's interest at the expense of the forum's).

For the modern case for forum preference in choice of law, see Weinberg, *Against Comity*, *supra* note 2, at 60-67 (arguing that reciprocal departures from forum law yield a systematic defense bias and fail to capture enforcement of any law); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984) (arguing that departures

To be sure, federal-state conflicts seem very different from interstate conflicts. Overshadowing any federal-state conflict is the immense imminence of federal supremacy.¹⁵ There might seem to be little point in using some standard choice-of-law method for federal-state conflicts, if the **(1992) TEX. L. REV. 1748** nation is always going to trump. Nothing, after all, impermeably shields state power from national intrusion.¹⁶ Given some rational basis for federal governance, we are prepared to see national lawmaking impinging even on matters of intensely local concern: family,¹⁷ education,¹⁸ personal injuries,¹⁹ insurance,²⁰ and the police.²¹

from forum law are discriminatory in that similarly situated residents of a forum will be treated differently depending on whether or not the case contains an out-of-state element, a factor that does not generally create a rational basis for the distinction; such departures also create unauthorized exceptions to legislation, undermine forum policy, or prevent the forum that has identified its preferred policy from developing it as its own).

15. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819) (Marshall, C.J.) (“[T]he constitution and the laws made in pursuance thereof . . . control the constitution and laws of the respective States, and cannot be controlled by them.”).

16. The Commerce Clause gives virtually plenary power to the nation. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that a federal statute regulating places of public accommodation, under the commerce power, can regulate a local motel that serves interstate travelers and purchases food on the interstate market); *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942) (holding that Congress can reach intrastate activity affecting interstate commerce). The Tenth Amendment at present is an unreliable constraint on the exercise of national power. See *New York v. United States*, 112 S.Ct. 2408 (1992) (striking down, under the Tenth Amendment, an act of Congress insofar as it would expose states to liability by forcing them to take title to hazardous waste for which disposal sites have not been found). But see *Garcia v. Metropolitan Transit Auth’y*, 469 U.S. 528 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), and holding that Congress can regulate the relation between state government and the state’s own employees). *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) is surely not an obstacle. *Erie* held only that Congress had no power to make state law, and hence that the Supreme Court had no power to make state law. *id.* at 78 (“Congress has no power to declare substantive rules of common law applicable in a State. . .”). *Erie* had nothing to say about the power of Congress or the courts to make substantive rules applicable in the nation. For my views on *Erie*, see Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989) [hereinafter Weinberg, *Federal Common Law*]. The Rules of Decision Act, 28 U.S.C. § 1652 (1988), of course, does not require application of state laws in cases in which they do not “apply,” or where the Constitution “otherwise require[s] or provide[s],” and does not speak to federal-state conflicts in state courts. See Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989).

17. See, e.g., Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1988) (providing that states may modify child custody determinations by courts of another state only under a set of narrow constraints); *McCarty v. McCarty*, 453 U.S. 210

Moreover, unlike interstate conflicts between similarly empowered sovereigns, federal-state conflicts are conflicts between sovereigns of overwhelmingly disparate legislative competence. Only the nation is the repository of unique, exclusive, and nationwide delegated powers. When there seems such scant room for judicial choice, it is not really surprising that the theory of federal-state conflicts is not congruent with general modern conflicts theory.

(1992) TEX. L. REV. 1749 But looking over the cases as we have them, it is not true that there is scant room for choice. Federal law does not always trump. From the earliest stirrings of American legal positivism, American civil justice has stood on implicit premises of dual governance, and a prime directive for the Supreme Court has always been to preserve our dual federalism. Even beyond this, the very absence of formal impediments to the erosion of dual federalism has elicited from the Supreme Court a variety of prudential means of shoring up state power.

So we find that when state law seems to encroach on federal policy, whether or not an act of Congress is at stake, the Court sets up a presumption in favor of state law and against preemption.²² Even when

(1981) (holding that federal law precludes a state court from dividing military retirement pay upon divorce pursuant to state community property laws).

18. *See, e.g.*, Civil Rights Act of 1968, Title IX, 20 U.S.C. §§ 1681(a), 1687 (1988) (tying financial assistance for education to compliance with federal guidelines); *Brown v. Bd. of Educ. of Topeka, Kansas*, 347 U.S. 483 (1954) (holding that the Fourteenth Amendment prohibits segregation of public schools by race).

19. Some of the recent tort-related bills filed in this faith include the Product Liability Reform Act of 1990, S. 1400, 101st Cong., 2d Sess. (1990); the Uniform Product Liability Act of 1989, H.R. 1636, 101st Cong., 1st Sess. (1989); and the Lawsuit Reform Act of 1989, S. 1100, 101st Cong., 1st Sess. (1989). For enacted law, *See, e.g.*, the Consumer Product Safety Act, 15 U.S.C. § 2072 (1988).

20. *See, e.g.*, Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906 (1988) (exempting classes of liability insurance providers and purchasers from certain state insurance regulations).

21. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to inform suspects of their rights prior to custodial interrogation); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding inadmissible evidence obtained by police through illegal searches and seizures).

22. *See Kamen v. Kemper Fin. Servs., Inc.*, 111 S.Ct. 1711, 1717 (1991); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-16 (1984). The leading case is probably *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)

no act of Congress is at stake, the Court resists federalization, even of an area of national policy concern.²³ Whether federal case law already exists, or whether federal law “governs” inchoately because invoking national policy concerns, the Court often borrows state law in preference to fashioning new federal law²⁴ or making unneeded encroachments on dispersed local governance.²⁵ Even when state law flies in the face of an act of Congress, the Court does not strike down state law out of hand. Rather, the Court tames supremacy by trying to divine the preemptive intentions of Congress.²⁶ In a case apparently controlled by an act of Congress, the Court is capable of holding that Congress intended to save state power.²⁷ If this produces what the Court has called “tension,”²⁸ (1992) *TEX. L. REV.* 1750 well, that is the price of a pesky federalism.

(“[F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons. . . .”). The presumption is particularly strong in the area of domestic relations; state family law must do “major damage” to federal interests before preemption will occur. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). For an interesting discussion of the rule against federal preemption of traditional state functions, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1024 ff. (1989).

23. See the discussion by Justice Harlan in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966): “It is by no means enough [to justify the fashioning of federal common law] that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.”

24. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 739-40 (1979) (incorporating state law to determine priority between state and federal liens).

25. See *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946) (upholding a state tax applied to Reconstruction Finance Corporation property). The classic case of borrowing state law to flesh out a federal statute remains *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (deciding that state law determines whether child is “child” for purpose of taking statutory copyright renewal rights, to avoid upsetting settled expectations under state intestacy and family laws). In enacting a later copyright act, Congress created a definition of “children” which includes illegitimates, 17 U.S.C. §§ 101, 304, thus overriding *De Sylva* on its facts, conforming to the Equal Protection Clause, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), and perhaps better vindicating the national interest in encouraging the works of authors, U.S. Const., art. I § 8, cl. 8.

26. See *English v. General Elec. Co.*, 496 U.S. 72, 84-86 (1990).

27. *Id.* at 86. Moreover, the Court is capable of construing away a clause saving state law, see *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) (construing the saving clause in the Death on High Seas Act as jurisdictional only), or narrowing it to

I do not want to be understood as endorsing such thinking, however hallowed by tradition. I mean only to say that the jurisprudence seems to leave room for a choice-of-law process. The question becomes not whether state law is available for choice when there is federal, but rather whether we have a persuasive way of choosing.

B. Toward Unified Theory

Interestingly, a unifying conception of the choice-of-law process has long been available. The Supreme Court, and knowledgeable observers, have long understood that the question whether federal law should displace state law is primarily a matter of construction or interpretation of federal law.²⁹ Similarly, most courts and knowledgeable observers today understand that the way to approach interstate or international conflicts is by construction or interpretation of forum law.³⁰ The Supreme Court, from time to time, has recognized the essential features of the modern method in both contexts.³¹ Yet today the Court rarely attempts to resolve

a single state designated for all cases by the Court itself, *see* *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (construing the saving clause in the Clean Water Act to save only the law of the state of the pollution source).

28. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

29. *See, e.g.,* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (describing the applicability of federal law in actual conflict with state law as a function of Congressional intention); *see also* *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (stating that the question whether federal law applies in an international conflict is a question of construction or interpretation of federal law); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 479-80 (2d ed. 1988).

I insert the word “primarily” in the text because in the category of cases I call “actual” federal-state conflicts, the existence of conflict between the nation and the state is a precondition for the assertion of federal power, while in the true interstate cases the existence of conflict is no precondition for the assertion of forum power. *See infra* text accompanying notes 37 and 41. Of course, once an “actual” federal-state conflict is found, federal law is the only response to it; there is no occasion for further consideration of state law. *See infra* notes 46, 95, and accompanying text.

30. *See* RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS § 6.2(b) (1971). *See generally* *Currie, supra* note 14, at 231 (describing choice of law as essentially a question of construction or interpretation). On how construction of forum law decides conflicts questions under the modern method, see my explanation in *Vernon et al., supra* note 2, at 299-308.

31. For the federal-state conflict, *see, e.g.,* *Schneidewind*, 485 U.S. at 299. For the interstate conflict, *see* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1989); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

a federal-state conflict through the kind of construction or interpretation that is at the heart of the modern method for interstate conflicts.

Quite apart from whatever benefit might inhere in unification of conflicts law, the scrupulousness of the modern method would carry a payoff in persuasiveness. In conflicts cases interpretation of law is intimate; it involves digging into the likely current policy supports and bounds of law. Of course the decision of cases is always an exercise in the articulation of public policy, and thus, in a sense, always political. But the dispassionate identification and articulation of the perhaps conflicting **(1992) TEX. L. REV. 1751** requirements of public policy is a far more principled process than recourse to the political biases with which the decider comes to a case, however such biases may be cloaked by formalisms. Policy analysis is a more effective constraint on such politicization than any number of comforting but manipulable formalisms,³² because like all thoughtful inquiry, it can be tested. We should know the policy reasons for judicial wrong turns, if only to help ensure apposite argumentation in later cases, and informed legislative oversight.

C. Politics and Theory in Today's Supreme Court

The Court's own preemption cases are saved from crude politicization only because the politics of federal-state conflicts are too confusing to permit it. The current majority, appointees of the Reagan and Bush administrations, might care about states' rights, but they also might want to control intrusions of state regulation upon the nation's markets. They might not like federal overregulation, but they might want corporate defendants to have the benefit of a defense of compliance with some federal requirement. One majority might relish a new federal defense, but another equally conservative majority scruple to fashion one at common law.

This means that today we cannot begin to predict when preemption will occur. Of course, we cannot be sure where any path of emerging common law will lead, but rarely have we had so little sense of direction.

32. See Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. REV. 457, 486-87 (1924) (arguing that formalistic decisions are manipulations of abstractions, and unlike purposive reasoning, conceal the premises of decision); 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, 401 (1950) (arguing that courts can choose among canons of construction to reach any desired result).

If federal law is going to preempt state law whenever a conservative judiciary regards a class of claims as better unlitigated--but not when the same judiciary is anxious to preserve historic state police powers--we cannot say that we have an intellectual foundation for preemption cases. We cannot even say that we have a new *Lochner*.³³

To be candid, the Court's most recent interstate conflicts cases seem at least as idiosyncratic as its federal-state ones.³⁴ But the interstate cases **(1992) TEX. L. REV. 1752** rest on a bedrock of powerful realist theory that seems wanting in the federal-state cases. The state "interest" that judges locate through the common-law method of conjectural purposive reasoning becomes a rational basis, in effect, that will enable the choice of an interested state's law to survive minimal constitutional scrutiny.³⁵ No

33. *Lochner v. New York*, 198 U.S. 45 (1905). See Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONSTITUTIONAL L. Q. 69, 69 (1988) (arguing that preemption is "the new *Lochner*"). For similar warnings, see S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 766 (1991); Laurence Tribe, *Anti-Cigarette Suits: Federalism with Smoke and Mirrors*, THE NATION, June 7, 1986, at 788. For a recent study of the implications of preemption for federalism, see Barbara Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181 (1991).

34. For example, in *Aramco* the Court was able to strip the American worker of Title VII protection against his American employer only by construing the statutory clause exempting aliens from coverage for conduct abroad as extending to Americans as well, although Congress chose not to do that. *EEOC v. Arabian Am. Oil Co.*, 111 S.Ct. 1227 (1991). In *Wortman*, the Court authorized the forum's longer statute of limitations, reasoning that the forum had an interest in preserving itself from stale claims. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1989). However, that reason would support application of a shorter, not a longer, statute. In *Shutts*, the Court purported to be concerned with fairness to the class of nonresident plaintiffs. *Shutts*, 472 U.S. at 810. Nevertheless, the Court switched gears and argued fairness to the defendant on the choice of law problem before it. *Id.* at 816-21. However, the defendant was within the general jurisdiction of the forum; this was not a long-arm case. There should have been no constitutional obstacle to the forum's regulation of the defendant, at least with respect to issues with which there was a plausible nexus with the defendant's out-of-state activities. For my views on *Aramco*, see Weinberg, *Against Comity*, *supra* note 2, at 73-75; for my views on *Wortman* and *Shutts*, see Weinberg, *Choosing Law*, *supra* note 2, at 695-98. For my additional views on *Shutts*, see Weinberg, *Overhauling Constitutional Theory*, *supra* note 2, at 93-95.

35. A measure of the strength of Theory in this area is that in constitutional review of state choices of law, the Court uses substantially the same interest analysis as is used as a choice-of-law method by courts below. See generally Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L. J. 342 (1987); Weinberg, *Minimal Scrutiny*, *supra* note 2. This should not be surprising; in crystallizing the scholarly

such simplified theoretical (1992) **TEX. L. REV. 1753** restatement is possible when one examines the federal-state conflict of laws.

II. Two Broad Groupings

For purposes of this essay I group federal-state conflicts into two new broad classes: cases of “*actual*” *conflict* in one class, and cases of “*inchoate*” *conflict* in the other. The categories overlap; nothing is simple, but it is helpful to recognize the theoretical distinctions.

development toward interest analysis, Brainerd Currie freely credited earlier work in the Supreme Court. For Currie’s view of the intellectual history of interest analysis, see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 605-05, 612 (citing *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914)), (613-14 (commenting on the role of Chief Justice Stone, citing Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 *HARV. L. REV.* 1210 (1946), and citing *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532 (1935) (Stone, C.J.)).

The theoretical convergence between the ordinary choice-of-law process and constitutional review of choices of law occurs at the heart of the theory, with the proposition that the law of a state without an interest in governing will not be applied if the law of an interested state is available. A case in which only one state has an interest presents the classic “false conflict” situation. In such cases the only rational solution for the forum is to apply the law of the interested state. So also, the Supreme Court will hold it a violation of the Due Process Clause when a court chooses the law of an uninterested state. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). This is not to say that the Court never makes mistakes. For a discussion of cases revealing both the underinclusiveness and overinclusiveness of the Court’s interest analysis in choosing law at the constitutional level, see generally VERNON ET AL., *supra* note 2, at 422; Weinberg, *Overhauling Constitutional Theory*, *supra* note 2. But this general theoretical convergence means, of course, that both argument--the constitutional argument and the “false conflict” argument--are open to courts choosing law in a false conflict case. And the Supremacy Clause suggests that it is the constitutional argument that is mandatory. For a good, recent example of a lower court properly choosing the interested state’s law in a “false conflict” case through constitutional, rather than simply interest-analytic reasoning, see *Gustafson v. International Progress Enterprises*, 832 F.2d 637 (D.C. Cir. 1987).

I have shown elsewhere that the Supreme Court’s “interest analysis” in conflicts cases is the sort of “minimal scrutiny” for “rational basis” that is familiar in other areas of constitutional review. Weinberg, *Minimal Scrutiny*, *supra* note 2, at 446. The Court, however, continues to test the constitutionality of choices of law in terms of state “interests,” and does not itself use the language of “minimal scrutiny” or “rational basis.” The Court’s test is state definitively in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 313 (1981): For a state’s choice of its own law to be constitutional, the state must have “a significant contact, or significant aggregation of contacts,” with the issue to be governed, “creating state interest, such that choice of its law is neither arbitrary nor fundamentally unfair.” For the Court’s recent cases testing the constitutionality of state choices of law, see *supra* note 2.

A. “Actual” Conflicts

I collect under the heading of “actual” conflicts the Court’s doctrines of preemption of conflicting state law (so called *conflict preemption*); supremacy; and, related to the supremacy doctrine, “reverse-*Erie*” preemption. “Actual” conflict is a term of art by which I do not mean to connote, circularly, a conflict-in-fact, but rather a case in which a party has raised the issue of conflict between state law and existing federal law. The category also excludes “*Erie* doctrine” on federal procedure in state-law cases; that doctrine is a narrow specialty of the law of federal courts, a side issue falling outside the larger questions raised here about the dual-court, dual-law system.

It is a hallmark of the “actual” conflict cases that the interesting question--the argued question--is unlikely to be how to resolve the conflict. Rather, argument is likely to begin with the question whether there is a conflict or not. This ultimately becomes a question of construction or interpretation of law. There is plenty of room for reason, argument, and consideration of state and national interest, but such argumentation is shifted from its more usual locus in problem-solving to this characteristic locus in ascertainment (ascertainment whether there is conflict-in-fact). The argumentation over the existence of conflict, rather than its resolution, occurs because once “actual” conflict is ascertained, the Supremacy Clause³⁶ potentially resolves the conflict in favor of the nation. When state law survives a challenge of this kind, frequently it is because the state has tried to govern within its traditional police powers, for purposes somewhat different from those underlying the federal law; or the state law is read as furthering the purposes of the federal.

Conflict is a true requirement of a choice of federal law for this class of cases. It is important to see the reason this is so. Without antecedent preemption of an area of law, dual governance is presumed;³⁷ the **(1992) TEX. L. REV. 1754** Supremacy Clause is like a sleeping giant. The state has presumptive parallel power, and there is nothing on which the Supremacy Clause can act. Only if state law becomes incompatible with federal must a state rule fall under the Supremacy Clause.

B. “Inchoate” conflicts

36. U.S. CONST. art. VI, cl. 2.

37. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”).

I would collect under the heading of “inchoate” conflicts the lines of authority on preemption of a field (*field preemption*, so-called); federalization; and, related to these, the fashioning of federal common law and the borrowing of state law. These are “inchoate” conflicts in the sense that they are decided as if latent or unrealized. In these cases--by far the more complex--argumentation is both more abstract and more contingent. The opening question is on a level of abstraction at which sovereigns, rather than laws, are chosen. The question is whether there is national legislative competence, perhaps exclusive national legislative competence. The argument centers upon the question whether, at bottom, the issue must be governed by the nation, rather than by the state.

In such cases, conflict between nation and state may not become manifest, but may be latent only. An issue may remain, as it traditionally has been, one of state law; but there is a possibility that the issue will be found intrinsically or uniquely federal. When the latter course is taken an issue is federalized or a field preempted. This amounts to a try at blotting out the American habit of dual governance--the notion that the state properly regulates in condominium with the nation. Here, too, we construe law; but in these “inchoate” conflicts, it is more likely that in arguing the purposes of federal law we may be arguing its *preemptive* purposes as well as, or in lieu of, its substantive ones. If we do not recognize federal power at this opening stage of analysis, state law will continue to govern of its own force.

But the even more intriguing feature of these “inchoate” conflicts is that answering the initial question of federal power in the affirmative does not necessarily end the inquiry. Rather, a ruling that federal law must “govern” tends to lead to a second-tier question: should the court fashion federal common law for the occasion, or borrow state law to furnish the content of the federal rule of decision? Thus, writers tend to describe these “inchoate” conflicts, more often than “actual” conflicts, as two-step cases.³⁸ Sometimes cases seem to be wholly focused on the question (1992) **TEX. L. REV. 1755** whether to fashion federal common law or to

38. See Weinberg, *Federal Common Law*, *supra* note 16, at 837; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 *CORNELL L. REV.* 733, 757 (1986); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 *HARV. L. REV.* 881, 952 (1986).

borrow state law, taking the answer to the antecedent inquiry about unique federal power as understood or agreed.³⁹

You will have noticed that the signal feature of these “inchoate” federal-state conflicts is that they arise whether or not there is any conflict with state law. Indeed, a court might well concede that there is no conflict at all between the federal policy it now perceives and the state law it otherwise might have applied. In just such a case of cozy intergovernmental harmony, the Supreme Court federalized foreign relations law in 1964. Writing for the Court in *Banco Nacional de Cuba v. Sabbatino*,⁴⁰ Justice Harlan observed that the Court might have applied state law to reach its result, since state and federal law were in practical accord on the issue there presented: whether courts in this country could adjudicate the legality of acts of foreign sovereigns. But Justice Harlan was explicit--the Court felt “constrained to make it clear”⁴¹--that federal, not state, law governs the foreign relations of the United States;⁴² the field is “intrinsicly,”⁴³ “uniquely”⁴⁴ federal.

These “inchoate” conflicts--at least on the question whether to borrow state law--do seem to invite a choice of law process. But I leave for another day discussion of “inchoate” federal-state conflicts, despite their great interest. Here I confine, or try to confine, discussion to the first, easier group: the “actual” conflict cases. Paradoxically, the easier cases are the hard ones for the demonstration I will be trying to make, precisely because in such cases the enormous fact of federal supremacy seems to crowd out the possibility of thought.

III. A Unifying Conception

A. *Interest Analysis and Federal-State Conflicts*

In this Article, then, I have chosen to work with the cases so haunted by federal supremacy that they seem to leave the least room for analysis--

39. See, e.g., *Miree v. DeKalb Count*, 433 U.S. 25 (1977) (deciding, on the assumption that the county’s contract with the FAA was governed by federal law, whether to fashion a federal rule or to let Georgia law govern).

40. 376 U.S. 398 (1964).

41. *Id.* at 425.

42. *Id.*

43. *Id.* at 427.

44. *Id.* at 424.

the cases in which existing federal law is allegedly in sharp conflict with state law.

I have selected select an interesting triad of recent cases illustrating the “actual” conflict problem. In commenting on the cases, I use the simple **(1992) TEX. L. REV. 1756** analytic method favored by most courts and commentators in this country for ordinary interstate conflicts cases. My initial aim in this is to exhibit the uses of interest analysis, as the modern method is called, in reaching convincing identifications of national policy in “actual” federal-state conflicts.

There is a practical reason modern choice-of-law analysis, although developed for interstate cases, would be nicely suited to cases of “actual” federal-state conflicts. Classic interest analysis cannot resolve true conflicts. That is not what interest analysis is for. The essential use of interest analysis is to identify conflicts, not to resolve them. When confronted with a true conflict of state laws, the interested forum simply applies its own law, or uses some other tie-breaking technique. Now, I have said that in cases of “actual” federal-state conflict, the litigated question will be whether or not a conflict exists. Interest analysis is a tool uniquely fitted to help answer that question. Of course a court finding actual federal-state conflict will apply federal law, as it is bound to do under oath and the Supremacy Clause, just as a court finding actual interstate conflict will apply forum law, as, arguably, it is bound to do under its oath of office and principles of equal protection. In the interstate case the dispositive issue is the existence or not of a clear forum interest, and in the federal-state case the existence or not of a clear national interest. This similarity suggests the feasibility of unification of the two fields of conflicts theory.

Modern analysis also gives one some of the analytic power needed to evaluate the doctrinal structures shaping the “actual” conflict cases: the “conflict” preemption, supremacy, and reverse-*Erie* lines of authority. In the following case studies I find that the separation of these lines of authority serves no important function, nor does the jurisdictional sorting that underlies the separation of the lines of authority. The “conflict” preemption, supremacy, and reverse-*Erie* cases are all very much alike.

I also find that doctrinal elements of the three modes of analysis either serve no function or serve some functions the Court identifies inaccurately. For example, I find unjustifiable the doctrine of “the otherwise valid excuse” in supremacy cases, and I find that the

discrimination wing of supremacy analysis is not a meaningful part of that analysis.

I warn against supposing that the presumption in favor of state law operates in cases of identified “actual” federal-state conflict. Identification of a federal-state conflict-in-fact, is precisely, what overcomes the presumption. In view of the Supremacy Clause, an attempt to impose some sort of choice of law process on the “actual” federal state conflict would be misguided.

(1992) **TEX. L. REV. 1757**I further conclude that straightforward determination of the purposes of federal law and the requirements of national policy in all these cases should be predicate to deciding them.⁴⁵

B. Interest Analysis and Interest Balancing

Before I begin, I must draw a vital distinction between frequently confused terms: between interest *analysis* and interest *balancing*. Although my focus is on the careful identification of national interest, I do not mean to suggest a role for the “balancing” or “weighing” of federal and state interests. This is not only because the process of “balancing” is burdensome and the upshot notoriously indeterminate, but chiefly because such “balancing” should be unavailable under the Supremacy Clause. In these “actual” conflict cases, once it is determined that state law is clearly inconsistent with identified national policy, prudential reasons to retain state governance (if such concerns exist) can be balanced against substantive federal policy only if more adroitly characterized as national, rather than state, concerns.⁴⁶ Even then, I should think it a rare case in which constraints of comity or federalism are held to outweigh substantive

45. For a similar conclusion for no-conflict cases, see Kevin Johnson, *Bridging the Gap: Some Thoughts about Interstitial Rulemaking and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879, 884 (1991) (arguing that the judiciary should fashion whatever national policy suggests would be the best federal rule and should not blindly borrow state law); see also FEDERAL COURTS STUDY COMMISSION, REPORT 93 (1990) (disapproving the practice of borrowing state statutes of limitations to limit federal actions and recommending federal limitation of federal actions).

46. For a similar insight, see James R. Ratner, *Using Currie’s Interest Analysis to Resolve Conflicts between State Regulation and the Sherman Act*, 30 WM. & MARY L. REV. 705 (1989). For earlier argumentation that it is unsuitable, in light of federal supremacy, to weigh state against national policies, see Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1225-26 (1977).

national policy. When an act of Congress is at issue, I doubt that judges ordinarily should have the discretion to “balance” away the legislation.⁴⁷

I do not mean here to trench on the province of “borrowed” state law and similar doctrines. Given acknowledged federal power, of course courts may furnish the content of a federal rule of decision with materials selected from state law. Rather, my point is the more obvious one: that there is no way, consistent with the Supremacy Clause, to decline to acknowledge federal power when the national interest requires its exercise. The greater the conflict between state law and the national interest, the more unyielding should we find the supremacy of federal law.

(1992) TEX. L. REV. 1758 C. *Toward the Death of Conflicts*

The realist view of *both* the federal-state and interstate choice of law process must be that there *is* no choice of law process. Interest analysis, properly understood, is not a choice-of-law process, but rather is simply construction and interpretation of federal law in the federal-state case (and of forum law in the interstate case), without attempted balancing of other interests against those of the nation (forum). Indeed, in interstate conflicts, the Supreme Court has refused to require interest balancing under the Full Faith and Credit Clause. The Court’s thinking is that, however strong another state’s interest, the interested forum must have constitutional power to apply its own law.⁴⁸ For a variety of reasons, it

47. For an interesting judicial expression of this view in an international conflict case, see *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 953, 955 (D.C. Cir. 1984) (Wilkey, J.) (“[N]ational laws do not evaporate when counteracted by the legislation of another sovereign. . . . Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to . . . resolv[e] competing claims. . . .”).

48. *Pacific Employers Ins. Co. v. Industrial Acc. Comm’n*, 306 U.S. 493, 500-01 (1939) (holding that the Full Faith and Credit Clause of the Constitution does not prevent a state from applying its own validly enacted laws in its own courts to govern a local occurrence merely because another state has an interest in regulating the same occurrence because the parties are its own domiciliaries). In the international context, especially in the presence of an act of Congress, this thinking becomes particularly compelling. See *Laker Airways Ltd.*, 731 F.2d at 953, 955. The Supreme Court has not adopted the interest-balancing methodologies proposed by other authorities, and the new Court’s recent adventure in reactionary comity in *ARAMCO* was immediately written out of the law by Congress. Civil Rights Act of 1991, P.L. No. 102-166, § 109(b)(1), 105 Stat. 1071, 1077 (1992) (codified as amended at 42 U.S.C.A. § 2000e(f) (West Supp. 1992)) (overriding *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991), which held that Title VII of the Civil Rights Act of 1964 does not extend to suits between American nationals for discriminations in foreign employment). In a case of identified federal-state conflict, that there can be no choice-of-law process consistent with the Supremacy Clause

has become clearer today that an interested forum *should* apply its own law.⁴⁹

Nevertheless, most courts and commentators today insist on choice of law process: on some form of interest balancing.⁵⁰ In both interstate and federal-state conflicts, techniques of “conflicts” reasoning have been developed on the thinking that a court “chooses” law. But “conflicts” reasoning in this sense simply deflects from the deeper truth that the forum’s real choice is only whether to apply or evade its own law.⁵¹ From this realist perspective, in every interstate case, and in every ascertained “actual” federal-state conflict, all that should be happening is the careful interpretation of forum (or federal) law to see whether it should apply. In other words, interest analysis, properly understood, is not a way of choosing law; rather, it is ordinary substantive legal reasoning. There should be no law of the conflict of laws.

Of course it would be naive to suppose that federal policy and the national interest are always conveniently unidimensional, unbounded, or **(1992) TEX. L. REV. 1759** self-evident. A fully determinate analysis will be elusive, here as elsewhere. But it is better, I think, for courts to face up to the task of policy analysis than to risk outcomes based on unarticulated policy,⁵² or on vague notions of comity and federalism independent of substantive national policy.

I confess that the politics of the day make me nervous about my conclusions. A national judiciary in which liberalizing influences atrophy is a depressing repository of a rationalized understanding of national power. But although I care about liberalizing influences, I also care about rationalized understanding.

IV. The Dual-Law System and the Presumption Against Preemption

becomes obvious.

49. For the modern case for forum preference in interstate and international choice of law, see Weinberg, *Against Comity*, *supra* note 2; Weinberg, *On Departing from Forum Law*, *supra* note 14.

50. For a survey of attempts to resolve true conflicts by resort to interest balancing in one form or another, see VERNON ET AL., *supra* note 2, at 355-73.

51. See Cook, *supra* note 32, at 475-85. This was one of Cook’s essential insights.

52. See *id.* at 488 (arguing that formalisms conceal the major premise of decision; citing Holmes).

Ordinarily, in either state or federal courts, the question of conflict between the nation and a state should not arise. Despite the juggernaut of federal supremacy, Americans are accustomed to a surprisingly peaceable dual governance. State and federal laws govern in condominium, without inter-systemic disturbance. It is presumed that the states have parallel power. The Supremacy Clause may suggest to you some instability in such an arrangement, but typically the Supremacy Clause is not implicated by the exercise of state power compatible with federal.

Imagine, for example, that the police have entered your client's apartment without warrant or probable cause, and have ripped up all the furniture searching for nonexistent contraband. Your client is innocent. So she sues the police officers responsible. You would plead the case in several counts. These would be your alternative theories of recovery. You might plead a count under state trespass law. To this you might join a count under state civil rights law. You might also join a count under federal civil rights law. If you do plead this federal claim, you will have access to both the federal or state courts. As far as choice of law is concerned, it does not matter which forum you choose. In neither court will the existence of the federal claim necessarily affect the trial of the state claims. That can be so even when the elements of the federal claim, and the recognized defenses thereto, differ widely from those of the state claims. But in both sets of courts, if some feature of state law impinges on trial of the federal claim, the Supremacy Clause may come into play, blocking the offending feature of state law.

This easy, familiar duality of governance is the objective correlative of the doctrinal "presumption against preemption."

Quite unnecessarily, the Supreme Court has developed three distinct bodies of federal common law to deal with federal-state clashes: one for **(1992) TEX. L. REV. 1760** cases in federal court and two for cases in state court. The jurisdictional sorting here is unnecessary because whatever substantive law ultimately applies, state or federal, must apply in both sets of courts. That is the result whether one reasons under the Supremacy Clause, or the Due Process Clause. It also follows from the American legal positivism embraced in *Erie*, with its concern for the identified sources of law.⁵³

53. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (holding that in this country all law must emanate from some identifiable sovereign, even case law, and identifying the general common law as emanating from the state sovereigns).

Three interesting, and not fully reconcilable, recent cases exhibit these lines of authority on federal-state conflicts, and provide useful points of departure for what I have to say.

V. Conflict Preemption: The Example of *ARC America*

In *California v. ARC America Corp.*,⁵⁴ several states and other plaintiffs sued certain cement producers for price fixing. The plaintiffs sought treble damages for violation of the Sherman Act, and also sought damages under various state-law theories. Most of the cases were transferred for coordinated pretrial proceedings to a federal court in Arizona. Shortly thereafter some of the defendants decided to settle. This created a settlement fund of some \$32 million. At stake in *ARC America* was the right to share in this fund.

Not all the claims, it turned out, were good in law. Some of the plaintiffs' purchases of cement were direct from the defendants, other purchases through middlemen. Under the rule of *Illinois Brick Co. v. Illinois*,⁵⁵ "indirect purchasers" lack "standing" to sue under the Sherman Act.⁵⁶ This rule follows from the rule of *Hanover Shoe Corp. v. United Shoe Machinery Co.*, that the antitrust defendant cannot defend against a purchaser on the ground that the purchaser passed some of the injury on to a third person.⁵⁷ Thus, antitrust injury is exclusively lodged in the direct purchaser.

The indirect purchasers nevertheless sought payment out of the settlement fund, arguing that their rights were based not on federal antitrust law but rather on analogous state law. The direct purchasers objected. The district judge disallowed the indirect purchaser claims, and the Court **(1992) TEX. L. REV. 1761** of Appeals for the Ninth Circuit affirmed. The Ninth Circuit reasoned that to fail to apply *Illinois Brick* on such facts would frustrate its purposes. Those purposes were to

54. 490 U.S. 93 (1989).

55. 431 U.S. 720 (1976).

56. The rule of *Illinois Brick* is couched as a rule of "standing." For the view that federal principles of standing and other threshold rules of justiciability should be binding in state court adjudication of federal questions, see William A. Fletcher, *The Case or Controversy Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263 (1990). *But see* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989) (holding that state courts not bound to adhere to federal standing requirements in trial of federal questions).

57. *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

discourage overly complex antitrust litigation, enhance a direct purchaser's incentive to sue, and avoid multiple liabilities.⁵⁸

The Supreme Court reversed, 7-0. In an opinion by Justice White, the Court held that the \$32 million settlement fund *should* be apportioned between direct- and indirect-purchaser claims; the Supremacy Clause did not compel the application of *Illinois Brick* to the state-law claims.⁵⁹ If your intuitive reaction to this result is one of surprise, you are on the right track. After all, *ARC America* involved a single fund of money. Either the direct purchasers were entitled to it all or they were not. *Illinois Brick* certainly suggests that they were. But even without the special fact of the settlement fund, *ARC America* would impinge on federal antitrust policy. I need to dig further into *ARC America* to explain why I say this.

Justice White usefully recited the doctrinal litany before tackling the Ninth Circuit's policy analysis. He reminded us that there are only three bases for a finding of preemption. In the absence of (1) an express statement by Congress (*express preemption*), preemption could occur (*implied preemption*) either (2) where Congress intended that federal law occupy the field (*field preemption*), or (3) where there is an actual conflict between state and federal law (*conflict preemption*), such that (a) compliance with both is impossible; or such that (b) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶⁰ Entering into the pigeonholing spirit, Justice White thought that here there was (1) no express preemption, (2) no suggestion that Congress intended to oust state law, and (3) no actual conflict with state law. On this last point, Justice White noted that compliance with both laws was quite possible, if the fund was allocated. And nothing in the administration of the state claims would "stand as an obstacle" to the administration of the federal ones, because the fund was divisible. In short, nothing on the list of preemption categories matched the case.⁶¹

All this is smooth as glass, but just as transparent. If only because federal law would have made the direct purchasers the sole beneficiaries

58. *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1445-46 (9th Cir. 1987).

59. *California v. ARC Am. Corp.*, 490 U.S. 93, 103, 106 (1989).

60. *Id.* at 100-01.

61. *Id.* at 101-06.

of the settlement fund, at this point the reader cannot help feeling that Justice White is sidestepping the Supremacy Clause question.

Now Justice White went on to raise a distinct but recurrent issue in preemption analysis: a presumption against preemption.⁶² **(1992) TEX. L. REV. 1762** One understands the presumption as strengthening the case for state law. It might be supposed that in cases of “actual” state conflict, once conflict is identified, the presumption should come into play. Nothing could be more mistaken. Since, as I have said, the presumption is simply a proxy for the pre-existing condition of dual governance, once a court identifies an actual federal-state conflict, the presumption is overcome. To bring the presumption into play a second time would be counter to the Supremacy Clause.

In *ARC America*, the good news is that Justice White’s use of the presumption was sound. In White’s hands the presumption rightly became a peg on which to hang the Ninth Circuit’s various reasons for finding the state rule in conflict with *Illinois Brick*.⁶³ In other words, Justice White correctly saw the Court’s job as testing whether the presumption against preemption was overcome. The bad news is that White’s policy analysis was unpersuasive on these points.

Taking one by one the proffered rationales for forcing *Illinois Brick* on the states, White argued, first, that the indirect purchasers’ claims in *ARC America* would not unduly complicate federal litigation, because state claims were generally tried in state courts. Even if tried in federal courts, such claims would most likely materialize in the pendent jurisdiction of federal courts, and pendent jurisdiction is merely discretionary. Second, *Illinois Brick* was concerned with preserving incentives to enforce federal, not state, law. Third, there is no federal antitrust policy against multiple liability under state law.⁶⁴

I will return shortly to the question whether this thinking was sound. But for now note that Justice White had nothing further to say beyond his wholly reactive discussion of the presumption against preemption. He made no additional policy analysis.

A. *The Relation of State Claims to Federal Claims*

62. *Id.* at 101.

63. *Id.*

64. *Id.* at 103-05.

No doubt some of my readers are feeling the plausibility of Justice White's remarks. These readers may well be puzzling over the inordinate fuss in *ARC America* over what was, after all, only a state claim, and wondering why the mere co-existence of a parallel federal claim should have evoked shrill cries of preemption. So let me pause to give some background. We need to do this because the possible fungibility of state and federal law hinted at in *ARC America* goes to the heart of what was at stake in the case.

(1992) TEX. L. REV. 1763 There is an old maxim to the effect that “the plaintiff is master of its complaint.”⁶⁵ That is, if the plaintiff tries to insulate a claim from federal legislative or adjudicatory jurisdiction by characterizing the claim as arising under state law, courts are supposed to close their eyes to alternative hypotheses. But this accommodation to a plaintiff's strategy only seems workable. The trouble is that when a plaintiff pleads facts sufficient to establish a state claim, the facts also may establish a federal one.

When that happens, the plaintiff is tempting fate. Consider, for example, the little problem of res judicata. It is not only that the plaintiff cannot split a cause of action, or must follow compulsory joinder rules. The real problem is that trial of the same facts twice is intolerable. These days, state litigation of a state law claim sounding in antitrust can conclude the federal antitrust claim,⁶⁶ even though state courts lack jurisdiction to try a federal antitrust claim.⁶⁷ And the obvious res judicata

65. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987); *Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983) (citing *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)).

66. I cast the res judicata pitfall in tentative terms because the effect of a state judgment in subsequent federal litigation is currently a function of state judgments law. 28 U.S.C. § 1738 (1988). But the risk is serious. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-83 (1985) (holding that a plaintiff defeated in state court on state law claim could be precluded from bringing federal antitrust claim on same facts in federal court, notwithstanding that exclusively federal antitrust claim could not have been brought in state court, if judgment-rendering state would give preclusive effect to a judgment entered by a court without subject-matter jurisdiction).

67. *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 287 (1922). See, e.g., *Marrese*, 470 U.S. at 379-83; *Vendo Co. v. Lektro Vend Corp.*, 433 U.S. 623, 664 (1977); *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943). Jurisdiction over private antitrust claims, not exclusive in terms, is granted to federal trial courts at 28 U.S.C. § 1337(a), and in Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26. It is curious that federal

risks of pleading state law analogies to federal theories are not the only risks. One may find one's state-law case yanked out of state court at the outset; a state claim analogous to antitrust will ground federal removal jurisdiction.⁶⁸ A hefty body of law has emerged, in the teeth of the "master of the complaint" maxim, holding, to the contrary, that the plaintiff's (1992) **TEX. L. REV. 1764** "artful pleading"⁶⁹ will not be allowed to oust federal courts of jurisdiction over what is "really" a federal claim.⁷⁰

So today a state theory of recovery is more than a simple analogy to a federal theory on the same facts. A state-law claim cannot be cabined in that way. One may be pleading the federal theory, in some virtual sense, when one pleads the state theory.

district courts are held to have exclusive jurisdiction over antitrust claims; the general rule today is that jurisdiction is concurrent in the absence of express statutory provision to the contrary. *Tafflin v. Levitt*, 493 U.S. 455, 460-66 (1990) (following rule of *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962)); see also the discussion in *Clafin v. Houseman*, 93 U.S. 130, 133 (1876).

68. See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n. 2 (1981) (approving the removal of a state-law case as an "artfully pleaded," "essentially federal law" case sounding in antitrust); cf. *Marrese*, 470 U.S. at 379-83 (involving a state claim sounding in antitrust, which could have been brought in the original jurisdiction of a federal trial court). By extension, *Marrese* in the state court was removable as "really federal." See *infra* note 70 and accompanying text.

69. The term "artful pleading" is usually traced to *Skelly Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950) (rejecting the plaintiff's "artful pleading" of an anticipated defense as an attempt to manufacture a federal question). In the removal context, see *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (permitting removal of a state action from state to federal court even though federal district courts then were held to lack the power to grant the injunction sought; removal was permitted because, despite "artful pleading," the action was "really federal"); see also *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397 (1987) (rejecting the defendant's attempt to remove an employment dispute by "artfully pleading" that the controversy arose out of a collective bargaining agreement).

70. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (holding that ERISA so completely preempted the plaintiff's claim for employee benefits under state law that it was removable to federal court, although ordinarily preemption is simply a defense in the state court); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) ("[O]riginal federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law."). A variant on this notion of what is "really" federal is the rule that a plaintiff may not defeat removal by omitting to plead a necessary federal question. *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 339-340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).

B. Analyzing ARC America

We can now evaluate *ARC America*.⁷¹ Reasonable minds can differ about whether the case was right on the merits. But the case was quite wrong on preemption. Justice White's wordplay about *Illinois Brick*'s irrelevance to state-law litigation⁷² cannot obscure the very real conflict between *Illinois Brick* and state law to the contrary. That should be obvious from the single fund at stake in ARC-America. Either the direct purchasers can have it all, under *Illinois Brick*,⁷³ or they could have only what was left over, under *ARC America*. And the logic of the two cases obviously requires that the indirect purchasers have first crack. Their rights must be determined first or the direct purchasers *would* have it all.

But *ARC America* seriously compromises *Illinois Brick* even apart from the single-fund situation. That is so because in a given dispute both the *ARC America* state claim and the *Illinois Brick* federal claim deal with the same set of facts. State claims like those in *ARC America* are pleaded simply to get around *Illinois Brick*. These end-run claims can now proceed to judgment under state law and can succeed because *ARC America* holds that the Supremacy Clause does not compel a result to the contrary. State (1992) TEX. L. REV. 1765 law allowing indirect purchaser suits indeed must impinge on the federal bar to consumer suits announced in *Illinois Brick*.

So you are quite right if you anticipate that the *Illinois Brick* Court's policy nightmares are going to come true.⁷⁴ Recall that the Court in *Illinois Brick* was worried about denying the direct purchaser the incentive of entire damages free of setoff for injury passed on to indirect purchasers; about the complexity of calculating the direct purchaser's real, as opposed to passed-on, injury, if the indirect purchaser were allowed to sue; and--if that calculation were not possible--about having to impose multiple liabilities on tortfeasors.⁷⁵ Those things may well happen now, not only in single-fund cases, but in suits for unliquidated damages.

71. *California v. ARC America Corp.*, 490 U.S. 93 (1989).

72. *Id.* at 103.

73. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1976).

74. For a related insight, see Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1717-1718 (1990).

75. This was the analysis of the court of appeals in *In re Cement & Concrete Antitrust Litigation*, 817 F.2d 1435, 1445-46 (9th Cir. 1987).

1. *The Scenario in Federal Court.*--It is interesting to play out the litigation as it would unfold in both sets of courts. There seem to be at least two scenarios likely to lead to trouble. First, a case raising both direct- and indirect-purchaser claims could now come under federal adjudication, even if the two sets of claims were lodged in different parties.⁷⁶ In this federal action, *ARC America* governs the permissibility of the state claims. But it is not clear whether *Illinois Brick* or *ARC America* would govern the further, separate question, whether the direct purchasers remain entitled to entire damages, trebled, in a case in which indirect-purchaser claims are also present. One's first reaction is to assume that, of course, direct purchasers must remain entitled to entire damages. That is the federal rule under *Illinois Brick and Hanover Shoe*.⁷⁷ But if the direct purchaser must be given an entire remedy, it well might be that a defendant in such a case would have to endure duplicative liabilities: apportioned liability to the indirect purchaser, and entire trebled damages to the direct purchasers. This, of course, is the ultimate bad dream under *Illinois Brick*. And the district court will have to do the very calculation of passed-on damages from which *Illinois Brick* was meant to spare it. So to hold *Illinois Brick* "governs" the direct-purchaser claims, paradoxically, would be to undo much that *Illinois Brick* stands for.

76. There would seem to be no important impediment of federal procedure. Federal litigants who have made both direct and indirect purchases before 1990 could join indirect-purchaser claims in a federal complaint, and a federal court is likely to take pendent jurisdiction. Justice White downplayed this possibility, but these state and federal claims easily pass the test of "common nucleus of operative fact." See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). For claims arising after 1990, both direct and indirect purchasers could join claims in a federal complaint; supplementary (*i.e.*, "pendent party") jurisdiction is now statutory, and dubious as White's view was then, the statute seems to leave even less judicial discretion now to decline pendent jurisdiction over a state claim arising out of the same injury that forms the subject of the federal claim. See 28 U.S.C. § 1367 (West Supp. 1992) (effective for cases filed on or after December 1, 1990). To the extent a class action is viable, the two sets of claimants can now form discrete but legitimate subclasses. Certainly cases presenting both sorts of claims can be consolidated, as was done in *ARC America*. Moreover, cases in state court involving direct purchaser claims under state law can be removed as "really" federal, and indirect claims in the state case will be removed at the same time.

77. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). See *supra* text accompanying note 57.

Nor can federal district courts avoid outcomes offensive to declared antitrust policy by holding that *Illinois Brick* does not apply in such cases, but rather that *ARC America*'s exception allowing apportionment applies. Once *ARC America* kicks in, it would become necessary to set up an *ARC America* apportionment of damages between the direct and indirect purchasers. The obvious way to accomplish this with fairness to the defendant is to require the jury to find a single sum representing the total liability of the defendant, and then, under the court's instructions, to make the *ARC America* apportionment. So the direct purchaser would no longer hold all the cards. The direct purchaser could no longer expect to recover entire damages trebled. The feared expenditure of federal judicial resources on calculating the apportionment could no longer be avoided. The litigational incentive to direct purchasers would be diminished. In short, every policy underlying *Illinois Brick* and *Hanover Shoe* would be frustrated.

The only barrier against these results would be the rather flimsy one of discretion to decline jurisdiction, on which Justice White so optimistically relied in *ARC America*. But if failure to decline jurisdiction in such cases would be abuse of discretion, then what did Justice White mean in *ARC America* when he said that state "antitrust" claims like those in *ARC America* were within the pendent jurisdiction of federal trial court? It seems plausible to assume, with Justice White, that the state claims remain within the discretionary jurisdiction of the federal courts, and therefore that some federal courts will indeed wind up trying some of these claims.⁷⁸

2. *The Scenario in Parallel Litigation.*--A second scenario plays itself out in parallel proceedings in both sets of courts. Because *ARC America* holds that state indirect-purchaser claims are not preempted by federal antitrust law, adjudication of some of these state claims in state court will occur, as Justice White anticipated in *ARC America*. Removal to federal court of state indirect-purchaser claims as "really federal" should not occur, because *Illinois Brick* holds there are no such federal claims. Indeed, the plaintiff jockeying to make litigation awkward for the defendant who is already defending parallel federal proceedings, or the plaintiff gambling on a more sympathetic forum in the state court, could insulate its **(1992) TEX. L. REV. 1767** case from removal by declining to

78. See *supra* note 70 on the effect on this analysis of federal statutory supplemental jurisdiction under 28 U.S.C.A. § 1367 (West Supp. 1992) (effective for cases filed on or after December 1, 1990).

plead whatever *direct*-purchaser claims it might have under state law, and refusing to join a direct purchaser's action. (of course the federal antitrust claims cannot be pleaded in state court; those are within the exclusive jurisdiction of the federal courts.⁷⁹)

To be sure, a state court might be unwilling to allocate proportionate liability against a seller in the absence of defendant middlemen, or to apportion damages in favor of indirect purchasers in the absence of plaintiff middlemen. But such "eternal triangles" are not new to the common law.⁸⁰ So we could expect to see at least some indirect-purchaser suits in state court and parallel direct-purchaser suits against the same tortfeasor in federal court, at least in cases involving large enough indirect-purchaser claims to attract legal representation.

Tortfeasors in such cases are under heavy risk of experiencing multiple liability: trebled entire damages to direct purchasers under federal law in federal court, and apportioned damages to indirect purchasers under state law in state court. It is a minor add-on to this awful exposure that the defendant would have to defend expensively in both sets of courts actions arising out of a single controversy. The state court would rightly deny defendant's motion to stay the state proceeding in favor of the federal litigation, since no help toward apportionment could be gleaned from a federal judgment free of setoff for passed-on injury. Nor could a federal judgment exonerating the defendant on the direct-purchaser claims save the defendant vis-a-vis the indirect-purchaser claims, at least if the plaintiffs in the two suits were not the same--notwithstanding that supplemental federal jurisdiction to try the cases of the indirect purchasers would have been available. There is no "supplemental" res judicata. The indirect purchasers would be under no obligation not to split a cause of action. They could not be bound by a federal ruling favorable to the defendant in an action by other parties.

Consider now the parallel proceedings in the federal court. Here, thanks to *ARC America*, the dangers of multiple liability and inconsistent judgments are quite apparent. A federal court adjudicating only direct-

79. See *supra* note 67.

80. See generally Menachem Mautner, "The Eternal Triangles of the Law": *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95 (1991). Mautner omits discussion of the interesting problem of the absent employer in an injured worker's action for damages against a third party. Under workers' compensation law, the injured worker is not permitted to sue the employer, yet the employer also may be at fault.

purchaser claims would be unable to allocate damages, but, under *Illinois Brick* and *Hanover Shoe*, would have to award entire damages, trebled; no *ARC America* apportionment could occur. A state judgment on the indirect-purchaser claims could not diminish the defendant's liability on the direct-purchaser claims, when the state does not purport to have tried the (1992) **TEX. L. REV. 1768** direct-purchaser claims. Thus a federal court in such a case might even stay the federal litigation pending resolution of the indirect-purchaser claims in state court.⁸¹ Indeed, a federal court probably should stay its hand in such a case, in order to avoid interference with *ARC America* apportionment under state law. But to see the probability of a federal stay is to see just one of the ways in which *ARC America* undermines supposed federal policy.

If *ARC America* nevertheless seems right on the merits, it is because *Illinois Brick* may be wrong. *Illinois Brick* seems contrary to the explicit language of the Clayton Act giving persons injured by antitrust violations a right to treble damages.⁸² *Illinois Brick*'s solicitude for the direct purchaser's incentive to sue in a case about price fixing seems insufficient to justify denying the indirect purchaser--perhaps a consumer--a remedy, especially since the indirect purchaser's injury is not usually tempered, as the direct purchaser's is, by the ability to pass some of it on. Ultimate consumers of non-capital goods have no one to pass the injury on to. Moreover, when the direct purchaser unloads some of its antitrust injury onto an indirect purchaser, it does so without incurring a corresponding offset from its claim for damages against the tortfeasor.⁸³ Indeed, while clearly intended to reinforce the direct purchaser's incentive to litigate, *Illinois Brick* weakens antitrust protective policies to the extent it gives no incentive to the direct purchaser to avoid passing on the injury to others. In addition, when the direct purchaser does succeed in passing on much of its injury to its customers, the direct purchaser would seem to have little real incentive to disrupt ongoing business relationships with litigation, notwithstanding its power to recover without offset for passed-on injury.

81. *Cf.* *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976) (holding that the federal court should stay federal action pending related adjudication in the state court, even when the United States was a party, and important questions of interpretation of federal law were at issue, in part in order to minimize piecemeal litigation).

82. Clayton Act § 4, 15 U.S.C. § 15(a) (1988).

83. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488-89 (1968).

It is true that the advent of modern complex litigation has not changed the practical difficulty of redressing individual consumers' losses, when they are small losses, even with statutory trebling of damages. This is so because the Court has placed massive roadblocks in the way of consumer class suits,⁸⁴ and consolidation of individual consumer claims is not an option when those claims are each too small to secure representation by counsel. Thus, even today, a consumers' antitrust remedy could rarely provide sufficient incentive for private enforcement of antitrust **(1992) TEX. L. REV. 1769** policies. It probably remains true that the best way of capturing dispersed consumer losses is to concentrate litigation incentives in the direct purchaser. To the extent that that is the crude reality, though, it is only the practical outcome of Supreme Court inhospitality to class actions. In theory, consumers' losses in the aggregate are both more complete and more weighty than direct purchasers' losses.

It may be that the *Illinois Brick* Court contentedly saw itself as putting the final, if superfluous, nail in the coffin of burdensome federal consumer class actions. But the Court did not articulate any such administrative policy. The Court did articulate a concern to avoid making the calculation of antitrust damages too complicated.⁸⁵ That concern about the difficulty of apportioning recoveries between direct and indirect purchasers now seems questionable since that is precisely what *ARC America* holds should be done.

Illinois Brick's primary concern, about multiple liability, also seems overblown; cases like *ARC America*, if brought in federal court, tend to be consolidated for at least pretrial litigation, as *ARC America* was. With most claimants before the court, there is no fundamental reason the court, with the help of the parties, could not apportion recoveries between direct and indirect claims, as the Supreme Court itself contemplates in *ARC America*.⁸⁶ The rules would have to change, of course. *Hanover Shoe* would have to go by the boards. The direct purchaser would lose access to trebled damages free of setoff, and that may make *Illinois Brick* seem right to you after all, if the antitrust plaintiff's access to such damages is of

84. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (requiring plaintiffs (i.e., plaintiffs' counsel) must bankroll notice of the pendency of a class action for damages, in that case to more than two million absentee classmembers).

85. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1976) (discussing "evidentiary complexities and uncertainties").

86. *California v. ARC Am. Corp.*, 490 U.S. 93, 104-05 (1989).

paramount importance in your thinking. But then to the extent *Illinois Brick* is right, *ARC America* is wrong.

C. *On Departing from Federal Law*

We are now tooled up sufficiently to understand Justice White's moves, or non-moves, in *ARC America*. Recall Justice White's avoidance of any policy argumentation independent of the arguments advanced by the Ninth Circuit. White might have argued, for example, that permitting suits not available under federal law would enhance overall deterrence. You will observe, however, that any such policy argumentation would have savaged *Illinois Brick* overtly, because it would have been a negative evaluation of *Illinois Brick*'s effect on deterrence. We may speculate that the majority was not prepared to go that far. Indeed, the Court still insists on retaining *Illinois Brick*, at least in form. In the Term following *ARC America*, in (1992) **TEX. L. REV. 1770** *Kansas v. Utilicorp United, Inc.*,⁸⁷ the majority ruled that *Illinois Brick* still covered all cases. Dissenting, Justice White pointed to the suggestion he had made already in *ARC America* itself, that indirect purchasers should be able to sue even under federal law in those cases in which it would not be hard to calculate the extent to which the direct purchaser had passed injury on to the indirect purchaser.⁸⁸ So the author of *ARC America* makes substantially the same evaluation of it that we have made: the case is a real, if covert, departure from declared national policy.

The interesting analogy, here, is to a choice of nonforum law in the interstate true conflict case. Consider the situation in which, in an interstate or international conflict of laws, the forum has determined that it has an interest in applying its own law, but that nevertheless it should choose the law of the other interested state or nation. The forum may say it is exercising a wise comity, or choosing "the better law," or applying the law of a place of "more significant contact." But forget these abstractions and think about what is really happening. A departure from forum law undermines forum law in at least three ways.⁸⁹

87. 110 S.Ct. 2807 (1990).

88. *Id.* at 2819 (White, J., dissenting) ("Indeed, just last Term we observed that under *Illinois Brick* 'indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the coverage was passed on to them.'" (quoting *ARC America*, 490 U.S. at 102 & n.6)).

89. For discussion of the impropriety of departures from the law of the interested forum in interstate or international cases, see generally Weinberg, *Against Comity*, *supra*

First, in permitting an escape from its own law, the interested forum treats litigants in conflicts cases, who have access to nonforum law, differently from the way it treats litigants in wholly domestic cases, who do not. Yet an extraterritorial contact rarely supplies a rational basis for the discrimination, since, by hypothesis, the forum is “interested”; it has already found that it is as interested in applying its law in the multistate as in the domestic case. After *ARC America*, analogous dysfunction occurs, for example, in states that have adopted the “direct purchasers only” rule of *Illinois Brick*. Antitrust defendants triable under the laws of “indirect-purchaser” states are exposed to liabilities and expenses from which similarly situated tortfeasors, not triable under such laws, are shielded.

Second, a departure from forum law seriously but covertly undercuts forum policy. The departure from forum law creates an unconsidered, tacit **(1992) TEX. L. REV. 1771** “exception” to the forum rule, suggesting that the policies underlying the rule are less urgent than previously thought, while offering no substantive reasons for that conclusion. In just this way, in his *Utilicorp* dissent, Justice White all but acknowledged that *Arc America* had driven a truck through *Illinois Brick*.⁹⁰ We have already indulged the speculation that White intended to undermine *Illinois Brick*, but was able to sell the Court on *ARC America* only by not attacking *Illinois Brick* overtly.⁹¹

Third, a departure from forum law implies that law chosen is better law. This is bad judicial process, because such an implication, looked at head on, is a recognition that the forum’s true current policy has outrun outmoded forum “law”. A tension arises between declared and true forum policies. That effect is vivid in *ARC America*. One looks at the result and begins to reassess *Illinois Brick*. As a matter of sound judicial process, the way to deal with situations like this is for the forum to face up to the

note 2, at 65-67 (arguing that systematic departures from forum law disable the parties from capturing enforcement of any law and encourage global lawlessness); Weinberg, *On Departing from Forum Law*, *supra* note 14 (arguing that departure from the law of an interested forum is discriminatory, undermines forum policy, and creates other dysfunction in administration of law at the forum). The problem of diminished law enforcement under a regime of comity-based departures from forum law in interstate or international conflicts, noted in *Against Comity*, *supra*, also has its analog in cases in which plaintiffs rely on federal law. See *infra* note 154-55 and accompanying text on the problem of departures from federal law when the effect of state law would be to diminish the federal right.

90. See *Utilicorp*, 110 S.Ct. at 2819 (White, J., dissenting).

91. See *supra* notes 87-88 and accompanying text.

argument for reassessment of its declared policy, and to articulate its substantive reasons for so doing or declining so to do. An evasive flight to nonforum law denies to litigants and the bar an understanding of what current forum policy is. Worse, the practice substitutes conflicts reasoning for reasoning on the issues and thus impedes not only the argumentation of issues, but also effective legislative oversight. In short, a departure from forum law produces dysfunction at the forum.

I might add that departures from forum law may set up choice-of-law instabilities as well. For example, in 1981, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*,⁹² the Supreme Court held that in the silence of Congress it would not infer a right of contribution between joint tortfeasors in antitrust cases.⁹³ That holding has been taken to be a tacit holding on the merits--that there is no right of contribution between joint tortfeasors in antitrust, unless and until Congress provides one.⁹⁴ But *ARC America* seems to open up the speculation that state law would be free to provide such a right of contribution.

So I spoke imprecisely at the outset of this Article when I suggested there was room for a “choice-of-law” process in the federal-state conflict of laws. That may be so for inchoate conflicts, but does not seem so for **(1992) TEX. L. REV. 1772** actual conflicts. Rather, I should have said that there is room for *the exercise of reason*.

These reflections must be brought to bear on the supposition that a presumption in favor of state law should be taken into account in *resolving* an actual federal-state conflict. Rather, the presumption in favor of state law is clearly antecedent to identification of an actual federal-state conflict. The presumption is overcome when conflict is ascertained. The presumption is better formulated as a presumption against preemption, and, even more meaningfully, as a presumption of dual governance--of the workings of the familiar American two-law system. It is a reflection of the customary structure of dual governance in this country; it manifests a fundamental national policy in favor of dual governance in the absence of

92. 451 U.S. 630 (1981).

93. *Id.* at 640.

94. See *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27 (1st Cir. 1990); *Call v. Sumitomo Bank*, 881 F.2d 626, 631 (9th Cir. 1989); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1315-16 (5th Cir. 1983); see also Weinberg, *Federal Common Law*, *supra* note 16, at 839-40 (arguing that in *Texas Industries*, the Court struck the very policy balance it purported to lack capacity to strike).

any actual conflict with national substantive policy. But when we do see a clear conflict between federal and state policy, there is no room for a *second* presumption in favor of state law. To raise the presumption again in attempting to impose a choice-of-law process on resolution of an actual conflict would be inconsistent with federal supremacy.⁹⁵ Further prudential considerations of comity or federalism may be important in analysis of inchoate conflicts, but are inapposite in analysis of actual conflicts. What is the Supremacy Clause for?

On the other hand, the Supremacy Clause does not mean that courts must burden themselves with regretted decisional rules. That is not the way the common law works. Rather than resorting to state law, a court faced with a wrong older federal case can articulate currently perceived national policy and modify the regretted federal rule. It is emphatically the province and duty of courts to say what the law is.⁹⁶ The Supreme Court stands ready to correct serious misinterpretations in either set of courts. A conflict as serious as that in *ARC America* should evoke a sober appreciation of its dimensions, and some direct wrestling with the question whether the federal rule itself needs the scalpel. Even if the regretted federal rule in question is a statutory one, the common law is not utterly without power. A rationalizing interpretation might be available. This sort of realist scrutiny of the continuing viability of federal doctrine, this judicial awareness that if there is federal law on point, one must reason about it on the merits--apply it, construe it away, or overrule it outright--is what is wanting in *ARC America*.

I have more to say about *ARC America* and about federal preemption of conflicting state law. But first it will be convenient to take up a second problem case, decided in the term following *ARC America*.

(1992) TEX. L. REV. 1773 VI. Supremacy: The Example of *Howlett*

The classic supremacy-doctrine case undoubtedly is *Testa v. Katt*.⁹⁷ I state it in a footnote, presuming many of my readers are familiar with it. Instead, let me discuss an important recent example. The Supreme Court

95. Accord Ratner, *supra* note 46, at 769.

96. The language, of course, paraphrases *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

97. 330 U.S. 386 (1947) (holding, under the Supremacy Clause, that the state must entertain a federal statutory cause of action for treble damages, notwithstanding its view that the federal statute was a penal law, and its conflicts rule that it need not enforce the penal law of another sovereign).

decided *Howlett v. Rose*⁹⁸ in 1990. The case began as an action by a former high school student against a county school board and other school authorities. The complaint alleged that the school authorities unconstitutionally searched the student's car, and then suspended him from classes without due process. He sought damages and injunctive relief under the Federal Civil Rights Act of 1871⁹⁹ for violation of his Fourth and Fourteenth Amendment rights. An appellate court affirmed dismissal of the claim against the school board,¹⁰⁰ and the Florida Supreme Court denied review.¹⁰¹

In a previous case the Florida Supreme court had held Florida's sovereign immunity not waived for actions under federal law; the waiver statute recognized state responsibility under Florida tort law only.¹⁰² At this point a small internal voice should be whispering to you, "Unconstitutional." Nevertheless, in *Howlett* the Florida court went even further down this dubious road, and held that the state's sovereign immunity from federal claims also cloaked the defendant school board.¹⁰³

The Supreme Court reversed unanimously.¹⁰⁴ But the Court skirted the antecedent question of the selectiveness of Florida's waiver of sovereign immunity. Rather, the Court focused on the issue of school board amenability to suit, and held, in an opinion authored by Justice Stevens, that since the school board would be subject to suit in federal courts in such a case, it must be subject to suit in a state court too. The Supremacy Clause required this result.¹⁰⁵

A. *The "Otherwise Valid Excuse"*

98. 496 U.S. 356 (1990).

99. 42 U.S.C. § 1983 (1988).

100. *Howlett v. Rose*, 537 So.2d 706 (Fla. Dist. Ct. App. 1987).

101. *Howlett v. Rose*, 545 So.2d 1367 (Fla. 1987).

102. *Hill v. Dep't of Corrections*, 513 So.2d 129, 133 (1987).

103. *Howlett*, 537 So. 2d at 708, *review denied*, 545 So. 2d 1367 (Fla. 1987), *rev'd*, 496 U.S. 356 (1990).

104. *Howlett v. Rose*, 496 U.S. 356 (1990).

105. *Id.* at 368; *see also* *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980) (noting that state law cannot immunize government conduct from federal civil rights actions).

In striking down the school board's immunity, the *Howlett* Court was not long detained by the strange jurisprudence of "the otherwise valid (1992) TEX. L. REV. 1774 excuse."¹⁰⁶ That is a body of case law holding that an evenhanded state procedure can block adjudication of a federal right. In the Supremacy Clause line of cases now so conspicuously joined by *Howlett*, the Court's baseline thinking has always been that state courts are under no fundamental general duty to hear federal claims, because states are under no duty to build courts.¹⁰⁷ Of course all states in fact do have courts of general jurisdiction. But from this bizarre hypothesis of a courtless state, the Supreme Court reasons that litigants must take the state courts as they find them, complete with their procedural and administrative rules. Thus, the state is generally free to vindicate any nondiscriminatory procedural policy, in trial of a federal as well as a state case. The state has an "otherwise valid excuse."¹⁰⁸ So, for example, a state court that would dismiss for forum non conveniens a state claim with which it has scant territorial connection is free to dismiss for forum non conveniens a federal claim with which it has scant territorial connection.¹⁰⁹

From time to time, nevertheless, the Supreme Court will reach down through the dual-court system and force federal procedure on state courts adjudicating federal claims, even when the state's conflicting procedures are not discriminatory.¹¹⁰ When this will happen is not predictable;

106. *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 388 (1929).

107. *See id.* at 387 (noting that Congress does not purport to compel states to create courts to hear the federal claim); *see also* *McKnett v. St. Louis & S.F.R'way*, 292 U.S. 230, 233-34 (1934) (same). Query whether this view is sound; neither the Constitution nor the first Judiciary Act provided federal trial courts with jurisdiction over federal questions generally, yet the Supreme Court's Article III jurisdiction over federal questions generally is, explicitly, appellate. In *Howlett*, mandatory exercise of concurrent jurisdiction is, more intelligibly, inferred from the Supremacy Clause, as requiring the two sets of courts to form "one system of jurisprudence". *Howlett*, 496 U.S. at 367-69 (quoting *Clafin v. Houseman*, 93 U.S. 130, 137 (1876), and citing *THE FEDERALIST* No. 82, at 132 (Alexander Hamilton) (E. Bourne ed., 1947)).

108. *Douglas*, 279 U.S. at 388.

109. *See Missouri ex rel. Southern R'way v. Mayfield*, 340 U.S. 1, 4-5 (1950) (holding that a state court retains the discretion to dismiss for forum non conveniens a federal claim with which the state has scant connections if it would also dismiss a state claim on similar facts (citing *Douglas*, 279 U.S. at 388)).

110. *See, e.g., Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 362-64 (1952) (requiring a state court to furnish a jury trial on the issue of fraud in the procurement of a release in

national policy seems as clearly implicated in cases in which an “otherwise valid excuse” is found as it is in cases in which state procedure is held too corrosive of federal substantive policy. In *Howlett*, the Court reasoned in a circular way that it was not an “otherwise valid excuse” that Florida law shielded school boards from suit. Because federal law would not have (1992) **TEX. L. REV. 1775** shielded the school board and Florida law would, Florida law was inconsistent with federal. “An excuse that is inconsistent with or violates federal law is not a valid excuse. . . .”¹¹¹ Yet all state litigational rules that impede enforcement of federal law are “inconsistent” with it.

It is hard to see why there should be a doctrine of excuse from the obligation imposed by the Supremacy Clause. If a rule on parties, as in *Howlett*, or any other more clearly procedural rule, be proffered as an “excuse” from the Supremacy Clause obligation to hear a federal case, that rule would seem to be a nullity. Perhaps the hardest case for this position is the case of forum non conveniens. In particular, a state’s territorial unconnectedness from a case may seem a compelling reason to excuse the state from trying it.¹¹² Quite recently the Supreme Court has felt itself unwilling to force courthouse doors open in a place remote from a

a personal injury action under the FELA); *see also* *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-240 (1969) (holding that under the federal civil rights choice-of-law statute, 42 U.S.C. § 1988, a state must furnish remedies “responsive to the need whenever a federal right is impaired,” whether drawing the remedy from federal or state sources). *Dice* and *Sullivan* belong to the category of “reverse-*Erie*” cases discussed *infra* Part VI.

111. *Howlett*, 496 U.S. 371.

112. *See Mayfield*, 340 U.S. at 4-5; *supra* text accompanying note 109. Very probably, *Mayfield* was wrongly decided. The FELA gives plaintiffs an absolute choice between federal and state forums, making unremovable an action brought originally in state court. *See infra* note 158 and accompanying text. It might be argued that an FELA plaintiff should have a choice among state forums as well. The carrier defendant liable under the Act is in interstate commerce. At the time of a motion to dismiss for forum non conveniens, the carrier is obviously within the general jurisdiction of the chosen forum, and thus either doing business there or maintaining some sort of presence there. The FELA contains a venue provision for cases brought in either set of courts. 45 U.S.C. §56 (1988). This provision makes venue proper, *inter alia*, where the defendant is “doing business” when the action commences. It is likely the defendant was “doing business” within the forum state in *Mayfield*, and is probably so doing in most likely optional forums. The jurisdiction the FELA thus forces on the state courts seems reasonably construable as forced on them even in cases like *Mayfield*. Indeed, as long as the defendant is doing business at the forum, it would seem to be discriminatory to deny forum access to a nonresident plaintiff under such circumstances, as the four dissenters in *Mayfield* argued. *See Mayfield*, 340 U.S. at 6-7 (Clark, J.,dissenting).

controversy, notwithstanding that the plaintiff invokes a federal right. Even a statutory grant of nationwide service of process does not seem to change this result, at least where fairness to the defendant may be an issue.¹¹³ But a rule to the contrary is hardly inconceivable; indeed, even more recently the Court had little difficulty with an “extraterritorial” venue for the antitrust injunction litigation in the *cause celebre* of *Pennzoil Co. v. Texaco, Inc.*¹¹⁴ In the end it is hard to avoid the conclusion that there must be nationwide adjudicatory power over an issue of national law. Certainly Congress has not hesitated to assert that power.¹¹⁵

(1992) TEX. L. REV. 1776 To be sure, the “otherwise valid excuse” seems a useful part of the “discrimination” wing of supremacy analysis. If the state erects its procedural hurdle as an indiscriminate obstacle to all claims, it has an “otherwise valid excuse;” if the state erects its procedural hurdle only as an obstacle to federal claims, discrimination is made out. Recall that in *Howlett*, the Florida statute waived immunity for state claims only. As to this, the Supreme Court was emphatic that it would not tolerate “discrimination against rights arising under federal laws,” and that an “excuse” that was in conflict with federal policy was not a valid

113. See *Stafford v. Briggs*, 444 U.S. 527, 544-45 (1980) (construing the nationwide service of process in Mandamus and Venue Act as not reasonably applicable to summon a remote government official into the forum state to defend a suit in his personal capacity); see also *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) (sidestepping the question of the constitutionality of nationwide service of process under the Securities Exchange Act of 1934 by dealing with the issue as a matter of venue under 28 U.S.C. § 1391(b) (1988)).

114. 481 U.S. 1 (1987) (vacating a New York federal district court injunction against a pending Texas state proceeding). Only Justice Marshall raised the question of extraterritoriality. *Id.* at 23-24 (Marshall, J., concurring).

115. See, Federal Sovereign Immunities Act of 1976, 28 U.S.C. § 1608 (1988) (providing worldwide service of process for claims under the act); *id.* § 1604 (providing concurrent jurisdiction of both state and federal courts in cases under Act); see also *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (holding that the Act was the exclusive vehicle for claims against foreign sovereigns in either set of courts). For discussion of nationwide adjudicatory power in federal question cases, see generally Robert H. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L. J. 1 (Winter 1982-83); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589 (1991); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988); Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 59 S. CAL. L. REV. 913, 937-940 (1985).

excuse.¹¹⁶ But, as I will try to show, nothing in this justifies the doctrine of the “otherwise valid excuse.” Why does discrimination have to be a feature of supremacy analysis in the first place?

B. “Discrimination” Against Federal Claims

Why is the discrimination in *Howlett* important to the decision at all? Suppose in *Howlett* the state evenhandedly had retained its sovereign immunity for all cases. How could that affect the result? The state would have ruled, just as it did in *Howlett*, that state courts did not have to take federal civil rights cases, since the state had not waived state sovereign immunity. The state would have gone on to rule that school boards were just as immune from suit under federal as under state law. Why should the greater evenhandedness in this example require subordination of national policy?

We do know, without much pondering, what national policy *is* here-- at least until the current Supreme Court backs off on the merits. For thirty-seven years national policy has required school board responsibility in desegregation suits,¹¹⁷ and school board responsibility does not disappear in other federal civil rights suits.¹¹⁸ The doctrinal quirk that makes the policy a necessity in federal litigation has its analog in state litigation: The state itself has Eleventh Amendment immunity in federal court, sovereign immunity in state court.¹¹⁹

(1992) TEX. L. REV. 1777 At any level of abstraction discrimination will always be found in a supremacy case. There is an almost fractal quality in this phenomenon.¹²⁰ Under the Supreme Court’s own

116. *Howlett v. Rose*, 496 U.S. 356, 371 (1990).

117. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

118. For a late pre-*Howlett* instance, see *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

119. And see *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989) which holds that a state is not amenable to suit as a “person” within the meaning of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). *Will*, of course, applies in both state and federal court.

120. Fractals are a class of jagged curves or surfaces identified and named by the contemporary mathematician, Benoit Mandelbrot. Fractals have the distinctive property that they retain the same index of jaggedness when examined at any level of minuteness or abstraction. Mandelbrot proved that such phenomena as the coastlines of continents and the curves of stock prices with time are accurately represented by fractals. See generally BENOIT B. MANDELBROT, *THE FRACTAL GEOMETRY OF NATURE* (1983).

discrimination reasoning, as long as the state maintains courts of general jurisdiction to hear cases of trespass and wrongful suspension from high schools, the state may not decline to hear Section 1983 cases on the same facts. In other words, all cases in which a court of general jurisdiction refuses to apply otherwise applicable federal law are cases of “discrimination.” If the “discrimination” wing of supremacy analysis has any function, it should lie in something beyond identifying the fact that federal law was not applied. I think we can conclude that “discrimination against the federal cause of action” is as unhelpful to this line of cases as is its mirror concept, the “otherwise valid excuse.”

C. Choosing Sovereign Immunity Law

For the reader puzzling over all this high-handedness with Florida’s attempt to configure its own sovereign immunity, it is worth pausing to explain. The explanation will underscore both the national interest implicated in *Howlett*, and the legitimacy of the *Howlett* Court’s treatment of state law.

The Supreme Court’s odd-seeming choice of the law of sovereign *A* to determine the extent of sovereign *B*’s immunity is not in fact odd. I do not mean to make the obvious remark that *Howlett*’s result is explained, as of course it is, by the potency of federal supremacy and the importance of federal policy. Rather, I am pointing out that the Supreme Court reaches the same result in contexts in which the supremacy of federal policy is not a feature, or in which it is not the same sort of feature.

In interstate conflicts cases, for example, a state has power in its own courts to say what the sovereign immunity of a defendant sister state is. A California court can try a tort case against the state of Nevada, if California has a legitimate governmental interest in doing that, whether Nevada has waived immunity or not, if California has waived California’s. Nothing in that violates either the Due Process or Full Faith and Credit Clauses.¹²¹

(1992) TEX. L. REV. 1778 Similarly, it is for the nation--not France (and certainly not some state)--to say what the sovereign immunity of France is in an action against France in American courts, federal or state.¹²² And

121. *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

122. *See* Federal Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (defining the extent of foreign sovereign immunity in all courts in this country); *see also* *Verlinden B.V. v. Central Bank of*

before Congress took hold of the issue French sovereign immunity in our courts was the proper subject only of federal common law.¹²³

Finally, it is for the Supreme Court under the Constitution, and for Congress--not the state--to say what the sovereign immunity of a state is in an action against the state in federal courts,¹²⁴ and in an action against the state under federal law in either set of courts, as *Howlett* makes clear.

Howlett goes only a very little further from these, in thrusting the controlling view of immunity upon the defendant sovereign in its own courts. That is a further turn of the screw.

D. The General Inutility of the Supremacy Doctrine

Returning, then, to *Howlett*, we can see that the jurisdictional sorting between supremacy and preemption cases is unnecessary. The Court holds in *Howlett* that neither set of courts can apply state law on the issue of a state agency's sovereign immunity from a federal civil rights claim.¹²⁵ The Court holds in *ARC America* that either set of courts is free to apply state law on the issue of an indirect purchaser's standing to make an antitrust-like claim.¹²⁶ But in both cases the law must be the same in either set of courts.

Since that is so, little justifies sorting supremacy cases, so-called, from preemption cases. A good many preemption cases do arise in the state courts and are treated as "preemption" cases rather than supremacy cases;¹²⁷ it is as though supremacy doctrine--the "otherwise valid (1992)

Nigeria, 461 U.S. 480, 488-89 (1983) (holding that the Act is the exclusive vehicle for suits against foreign sovereigns).

123. See *Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 147 (1812) (fashioning a federal common-law rule of implied waiver of jurisdiction over a foreign sovereign); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 427 (1964) (fashioning a federal common-law rule precluding judicial scrutiny of act of a foreign state; holding the issue inherently and uniquely federal).

124. See U.S. CONST. amend. XI; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15 (1989) (determining that Congress has power under Commerce Clause to abrogate the states' Eleventh Amendment immunity, provided Congress does so with a clear statement); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress has power to abrogate states' Eleventh Amendment immunity where appropriate to vindicate rights given by the Fourteenth Amendment, provided Congress does so with a clear statement).

125. *Howlett v. Rose*, 496 U.S. 356 (1990).

126. *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

127. See, e.g., *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991)

TEX. L. REV. 1779 excuse,” the “discrimination against the federal claim,” the whole bag of tricks--is forgotten in such cases. Supremacy doctrine captures the reality that courts which are expected to apply federal law can manipulate state law to defeat the expectation. But that is a risk in federal courts as well as state. In *Howlett*, Justice Stevens does touch on the weird coexistence of a “supremacy” line of cases and a separate “preemption” line of cases. But, he says, it does not matter which of the two ways you analyze *Howlett*; *Howlett* comes out the same.¹²⁸ Now, perhaps in another case a different analysis might well make a difference, since the two inquiries are quite distinct. And, as will become clearer, I think there is something each of these analyses can contribute to thinking about a federal-state conflict. Thus I do not argue that either of these analyses should be jettisoned. Indeed, their more functional features probably should be merged. My argument at this point is that treatment should be the same in both sets of courts. The Supremacy Clause imposes an obligation to apply applicable federal law as the supreme law of the land. That obligation is a binding on federal as on state courts.

1. The Duty to Take a Federal Case.--The Supreme Court thought a supremacy analysis appropriate for *Howlett* probably because the question in *Howlett* is the propriety of a state court’s dismissal of a federal case. That is the familiar question in most “supremacy” cases. Lawyers tend to perceive those sorts of cases not as typical conflicts, but as refusals by the state courts to entertain a federal cause of action. It was for just such cases that supremacy analysis was tailored, with its concern about “discrimination against the federal cause of action.” Out of such material the Supreme Court has elaborated an obligation on the part of state judges, under the Supremacy Clause, to take a federal case.

(reversing the Wisconsin Supreme Court, holding that Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt local governmental regulation of pesticide use); *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990) (reversing the Texas Supreme Court and holding that the Employee Retirement Income Security Act of 1974 (ERISA) preempts an employee’s state-law wrongful discharge claim when discharge is based on the employer’s desire to avoid making contributions to pension fund); *United Steelworkers of America v. Rawson*, 110 S.Ct. 1904 (1990) (reversing the Idaho Supreme Court and holding that the Labor Management Relations Act (LMRA) preempts state-law claims of union negligence in inspection of mines).

128. *Howlett*, 496 U.S. at 375 (Stevens, J.) (noting that “whether . . . framed in pre-emption terms, . . . or in the obligation to assume jurisdiction over a ‘federal’ cause of action,” the state court’s dismissal violated the Supremacy Clause).

There is a familiar but misleading analogy here with a state court's supposed duty, under the Full Faith and Credit Clause, to entertain a sister state's cause of action.¹²⁹ In the interstate instance, just as in the federal-state instance, the Court considers whether the state is discriminating against the nonforum cause of action.¹³⁰ But such a formulation of the **(1992) TEX. L. REV. 1780** interstate cases overstates the position. In reality, there is no such duty to hear a sister state cause of action. The state without an interest in hearing a case, or with an interest in getting rid of it, properly may dismiss.¹³¹ The Full Faith and Credit Clause as a practical matter imposes no obligation to take the case in such circumstances.

It is time someone pointed out that the Supremacy Clause works quite differently. A state can have no interest--a state can have no *want* of interest--that makes a difference to its federal enforcement obligations. A state that "validly" may be "excused" from hearing a case arising under sister state law ought have no such luxury in a case arising under federal law.

129. *Hughes v. Fett*, 341 U.S. 609 (1951).

130. *Cf. Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-519 (1953) (explaining *Hughes v. Fetter*, 341 U.S. 609 (1951) and *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952)). A better, more interest-analytic reformulation of the constitutional position under the Full Faith and Credit Clause is available. The latter two cases, properly read, hold only that states *with no interest in dismissing* must take a sister-state claim. To be sure, in *Wells* the forum was permitted to bar a sister-state claim under its own statute of limitations. But, I would argue, that that is because the forum always has a legitimate interest in so doing. The formulation offered by the *Wells* Court was very different and linked to the notion of discrimination. The *Wells* Court distinguished *Hughes* and *First National Bank* on the ground that, in the former cases, the forum laid an "uneven hand" on the sister state cause of action; in *Wells*, on the other hand, the forum applied its statute of limitations evenhandedly to all claims. But the Court's perception of these interstate cases, as well as of the federal-state conflict in *Testa v. Katt*, 330 U.S. 386 (1947), was not entirely without interest-analytic content. In both *Testa* and *Hughes*, the Court reasoned that the state had no real interest in barring the claim. *Id.* at 394 ("It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts"); *Hughes*, 341 U.S. at 612 ("[Wisconsin] has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature. . ." (footnote omitted)). See also my remarks in *VERNON ET AL.*, *supra* note 2, at 464-65; Weinberg, *Overhauling Constitutional Theory*, *supra* note 2, at 86 & n. 82.

131. See *Wells*, 345 U.S. at 518-19 (holding that a forum may dismiss sister-state cause of action by applying nondiscriminatory shorter local statute of limitations); see also *supra* note 130.

2. *The Part Policy Plays: Howlett and ARC America Compared.*-- We have been discussing two cases about proper parties to federal claims. In *Howlett*, the Court imposes on the state adjudicating a federal claim a federal view of proper parties defendant. In *ARC America*, the Court declines to impose on federal adjudication of a state claim a federal view of proper parties plaintiff. Do these cases point in opposite directions?

The sources of substantive law differ in the two cases, and, unlike the identities of the respective trial courts, might be thought to distinguish them from each other. But the identification of the claims in *ARC America* as state claims also does not distinguish the case from *Howlett*. I think I have demonstrated sufficiently that *ARC America*'s choice of state law in fact effects a change in federal. In such cases, state claims are obviously only alternative theories of recovery used to avoid federal hurdles. As we have seen, pleading the facts will state the federal claims whether or not that is the pleader's intention. So the Supreme Court very **(1992) TEX. L. REV. 1781** often treats state claims of this kind as if they were federal claims.¹³² But even if the sources of law are treated as different in the two cases, that does not explain their diverging results. The question in both cases is the same: whether federal law ousts state law.

But these cases only seem to yield opposed results. In fact, both cases point in the same direction. Each supports enforcement of national substantive policy. Recall what was at stake in *Howlett*. If the state could say that school boards are not liable in civil rights actions in that state's courts, the customary modes of litigating school desegregation would be unavailable in that state's courts. The subtext might be a substantive hostility to school desegregation on the part of the state. The State's shielding of school boards from civil rights claims quite properly fell, under the Supremacy Clause.

Now consider what was really at stake in *ARC America*. Arguably Supreme Court jurisprudence had deprived consumers of important federal rights. Declared national policy was against the consumer; perceived

132. See, e.g., *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984) (holding a federal civil rights action for wrongful discharge held precluded by litigation of a state claim for breach of contract arising out of the same wrongful discharge); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring) (noting that state claims analogous to antitrust claims should be res judicata in subsequent antitrust suits). Justice Blackmun wrote the opinion for the Court in *Migra*. See also *supra* notes 66-70 and accompanying text.

national policy went against that grain. With the majority unwilling directly to reconsider its jurisprudence, the author of the opinions chose to subvert that jurisprudence by a flight to the better law of the state. Thus, the states' rights enthusiasts on the Court could join hands with their consumer-favoring brethren to accomplish this new hybrid administration of antitrust claims about price fixing. But *ARC America*--corrosive as it is of *Illinois Brick*--may well work to enhance enforcement of underlying antitrust policy.

3. *The Part "Discrimination" plays.*--The work actually done by the supremacy doctrines should now be tolerably clear. The hypothesis from which all else follows here is that the states cannot have a substantive policy clash with the nation. Not for very long. The stronger the state policy the quicker it must fall under the Supremacy Clause. Suppose, for example, that a state legislature enacts a statute which provides, "The black inhabitants of this state may not enter places of public accommodation in this state." That is not national policy, under either the Equal Protection Clause¹³³ or the Public Accommodations Act.¹³⁴ Clearly, upon the filing of a complaint, both state and federal judges must enforce **(1992) TEX. L. REV. 1782** these national policies, and not the state law. But the Court, saving what it can for the states, has allowed itself to suppose that a state can give effect to procedural policies in its own courts, even if these undercut federal substantive policies--up to a point. The Court sometimes speaks of an "otherwise valid excuse,"¹³⁵ just as, in the interstate case, the Court might find an excuse.¹³⁶ Or perhaps we might think of the Court in both sorts of cases as deferring to the understanding, familiar from interstate conflicts cases, that procedure generally is for the forum.¹³⁷

It is here that we can begin to discern a function for the discrimination wing of the inquiry. It may well be useful in a given supremacy case for the Supreme Court to be able to look behind a disingenuous state

133. U.S. CONST. amend. XIV, § 1, cl. 4.

134. Civil Rights Act of 1964, 42 U.S.C. § 2000a(a)-(e) (1988).

135. *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 388 (1929).

136. *See Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953) (holding that a state retains the right to use its own shorter statute of limitations to bar a sister-state cause of action if it applies the statute evenhandedly to all such claims).

137. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); RESTATEMENT OF CONFLICT OF LAWS § 585 (1934).

procedural ground of decision. But even apart from that function, I think the inquiry into discrimination is actually a workhorse doing a different job. It is the test of state interest.

The state's interest, of course, must be only procedural, as we have seen. When the state enforces even a procedural policy harsh and unvarying enough to undercut federal substantive rights too sharply, the Court tests whether the claimed procedural policy is real.¹³⁸ The policy is not a genuine concern if the state applies the offending procedure only to federal cases.¹³⁹

There is another familiar analog here: the inquiry into state discrimination against interstate commerce in cases under the dormant Commerce Clause. In both situations the Supreme Court has brought discrimination into the picture to test the reality of the state's interest.¹⁴⁰ In a Supremacy Clause case, the state's interests are limited to procedural ones. In a Commerce Clause case, the state's interests are in exercises of **(1992) TEX. L. REV. 1783** its police powers. But the discrimination analysis is really an interest analysis.

In conflict preemption cases, like *ARC America*, there is no discrimination analysis. These cases are as likely to be in federal court as in state, and it does not come easily to argue that a federal court is discriminating against a federal cause of action. So how are state interests assessed in cases like *ARC America*? In that case, Justice White did not explore state interests. But that inattentiveness is not characteristic of

138. See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 612 (1951) (Black, J.) (“The State has no real feeling of antagonism against wrongful death suits in general.”).

139. See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947) (Black, J.) (“It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts.”).

140. See, e.g., *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 898 (1988) (striking down a state law as discriminatory under Commerce Clause, even though not a violation of Equal Protection Clause); *City of Philadelphia v. New Jersey*, 437 U.S. 67 (1978) (prohibiting New Jersey from excluding imports of hazardous waste; although a state may protect its residents' environmental and pocketbook interests, it may not do so by discriminating against articles of commerce sent into the state); see also *Minnesota v. Clover Leaf Cramery Co.*, 449 U.S. 456, 471-472 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *Lewis v. BT Investment Managers, inc.*, 447 U.S. 27, 35-36 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 336-39 (1979).

conflict preemption cases.¹⁴¹ The problem in *ARC America* was that any explicit acknowledgment of the public good flowing from free consumer suits for price fixing would have been precisely the explicit disfavoring of *Illinois Brick* that the Court was trying to avoid. It must be faced that this difficulty--the disparagement of declared national policy--must generally attend the sympathetic consideration of state policies in a case of actual conflict.

4. *The Part State Interests Play, or, Rather, Do Not Play.*--We need to face up to the fact that state interests, if genuine, cannot easily be considered without undercutting conflicting federal law. A reference to state law is possible in a court contemplating changing federal law, or confident that federal law ought to trump even worthy state interests on the merits. But what bearing can state interests have on the outcome of a conflict preemption or supremacy problem, except to exhibit the problem? The salient feature of every case must be the nature of the national, not the state, interest. After all, if the national interest requires, federal law will be fashioned in the teeth of state procedural constraints, and state substantive law certainly will be struck down, notwithstanding the state police power.¹⁴²

There may well be national interests in state governance, depending on the particular case.¹⁴³ In such a situation of course it becomes **(1992)**

141. Compare *California v. ARC Am. Corp.*, 490 U.S. 93 (1989) with *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482 (1991); *English v. General Elec. Co.*, 496 U.S. 72, 83 (1990); *Felder v. Casey*, 487 U.S. 131, 137, 142-143 (1988); *Perry v. Thomas*, 482 U.S. 483, 486 (1987); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 596 (1987) (Powell, J., concurring); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213-14 (1985); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714-15 (1984); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481-82 (1974); *Askew v. The American Waterways Operators, Inc.*, 411 U.S. 325, 329 (1973). Under the Commerce Clause, see *Northwest Cent. Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U.S. 493, 515, 526 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145 (1963).

142. See, e.g., *Free v. Bland*, 369 U.S. 663, 666 (1962) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law. . . . [A]ny state law . . . which interferes with or contrary to federal law, must yield.").

143. My favorite example, although the Court did not consider this ground, is *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). Arguably *Cooley* could reflect a national interest in *local* delivery of pilotage services to international or interstate shipping. A local pilot might be presumed to be more familiar with local waters; it would comport with the national interest in safe shipping for the state to raise funds for the support and hence encouragement of a corps of experienced local pilots. In this view, the holding that the state could extract compulsory pilotage fees from ships in

TEX. L. REV. 1784 appropriate, even in the absence of guidance from Congress, to weigh such federal structural policies against federal substantive policies. But it would be a mistake in actual conflict cases to infer a general federal policy in favor of comity, federalism, and states' rights. To construe away federal law or policy on any such generalization would be to amend judicially Article VI of the Constitution of the United States.

VII. Reverse-*Erie*: The Example of *Monessen*

A. *Federal Procedure in State Courts*

There is yet a third fairly distinct line of authority that joins the conflict preemption and supremacy cases. This third group is ultimately as indistinguishable from the first and second as they are from each other. In current doctrine these cases fit in, I suppose, as cases forming special constraints on the “otherwise valid excuse” in supremacy cases. They are simply an extension of the supremacy line of cases. Sometimes a member of the Court will recall these cases in that context.¹⁴⁴ But for the most part these cases seem to float in doctrinal isolation. Academics tend to speak of them as “reverse-*Erie*” cases.¹⁴⁵

These “reverse-*Erie*” cases, like the “supremacy doctrine” cases, involve trial of federal questions in state court. But in these cases the question is more sharply whether trial of federal questions in state court

interstate commerce need not suggest national deference to local policy, or the propriety of a purported balancing of local law against national policy favoring unimpeded interstate commerce.

144. See *Felder v. Casey*, 487 U.S. 131, 153 (1988) (holding that, regarding a claim brought in state court under 42 U.S.C. § 1983, a Wisconsin notice-of-claim statute is preempted pursuant to the Supremacy Clause; *id.* at 161 (O'Connor, J., dissenting) (criticizing the majority's decision in “reverse-*Erie*” terms).

145. The term appears traceable to William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 34 (1963). For current references, see Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1109 n. 50, 1113 n. 60 (1989); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 953, n. 93 (1990); Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L. J. 367, 383 n. 87 (1990); Allan R. Stein, *Erie and Court Access*, 100 YALE L. J. 1935, 2005 n. 326 (1991); Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 9 n. 37 (1988); see also *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149 (1988) (applying the reverse-*Erie* principle in the federal maritime context).

should follow federal procedural law. It is not only that if a state rule or requirement too sharply undercuts substantive federal policy, state courts will have to disregard the state requirement.¹⁴⁶ More remarkably, if state procedure (1992) TEX. L. REV. 1785 is inadequate to deal with a federal right, federal procedure is forced on the state.¹⁴⁷

The term, “reverse-*Erie*,” however, does not convey the true generality of these cases. To be sure, *Erie*-doctrine cases happen in federal courts, while most “reverse-*Erie*” cases happen in state courts. But the “reverse-*Erie*” cases are not just opposite; they are quite different. Not only state courts, but also federal courts, are subject to these rules; a federal court that would enforce a state procedural requirement in a state-law case nevertheless might have to disregard it in a federal-law case, just as a state court might.¹⁴⁸ To state the obvious, federal law is the supreme law of the land in federal courts as well as state.

Thus, if it is important to national policy that a particular federal issue be tried to a jury, neither set of courts can give that issue a bench trial.¹⁴⁹ If state legislation requires preliminary recourse to a mechanism of alternative dispute resolution, but Congress has conferred state judicial jurisdiction, state courts will have to take jurisdiction.¹⁵⁰ In the extreme

146. See *Felder*, 487 U.S. at 138 (striking down a state notice-of-claim statute as incompatible with a federal civil rights claim).

147. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969) (stating that state courts may be required to “fashion an effective equitable remedy” for a violation of federal law, notwithstanding limitations of state equitable remedies); *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 363 (1952) (holding that the state must provide trial by jury in an FELA case, even on an equitable issue).

148. Compare *Felder*, 487 U.S. at 132-33 (1988) (striking down state notice-of-claim statute for trial of federal civil rights claim), with *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 911 (7th Cir. 1985) (holding that federal courts entertaining state-law claims must apply state’s notice-of-claim statute).

149. See *Dice*, 342 U.S. at 363.

150. See *Felder*, 487 U.S. at 141 (requiring a state court to take jurisdiction of a federal civil rights suit, although a state notice-of-claim requirement for suits against a government agency would have required the plaintiff first to give the agency an opportunity to resolve the dispute).

Indeed, if a federal court would decline jurisdiction, a state court must. The most extreme example of this principle has been applied in ordinary state-law cases. See *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (holding that the Federal Arbitration Act preempts contrary state law in the same situation in state courts, notwithstanding the Act’s language referring to federal courts); *Prima Paint Corp. v. Flood & Conklin Mfg.*

case, a federal procedure will be forced on the state. If a special federal remedy--like a school desegregation decree--would be available for a case in federal court, the state may have to make the remedy available, even if uniquely so, for such cases in state court.¹⁵¹

What meaningful distinction can there be between reverse-*Erie* cases and the rest of the supremacy and conflict preemption cases? In the recent case of *Felder v. Casey* (in which the Supreme Court held preempted a (1992) TEX. L. REV. 1786 state notice-of-claim statute as an obstacle to trial of a federal civil rights claim), Justice Brennan adopted phraseology suggesting reverse-*Erie* reasoning.¹⁵² But the arresting feature of the various *Felder* opinions is that they tended severally to use most or all of these categories employed in “actual” conflict cases, speaking of “preemption” or “supremacy” or “reverse-*Erie*” interchangeably.¹⁵³

B. The Directions of National Policy

There is one general characteristic of the reverse-*Erie* cases which bears noting and which is important to the discussion that follows. As an initial proposition, a federal defense is as likely to preempt a state claim as a federal claim a state defense. But it is a fallacy to suppose that conflicts between federal rights and state procedural constraints should not ordinarily produce rulings in favor of plaintiffs. Justice Marshall once

Co., 388 U.S. 395, 404-05 (1967) (holding that the Federal Arbitration Act ousts state law to the contrary in suits on contracts in interstate commerce). See generally Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985). In these arbitration cases procedural law is the only medium of national interest.

151. See *Sullivan*, 396 U.S. at 238 (1969) (stating that state courts may be required “to fashion an effective equitable remedy” for a violation of federal law, notwithstanding limitations on state equitable remedies).

152. *Felder*, 487 U.S. at 151 (Brennan, J.) (“outcome-determinativeness”).

153. Justice Brennan described the notice-of-claim statute as “pre-empted,” *id.* at 134, 138, 140; used preemption-doctrine language about “standing as an obstacle” to Congressional purposes, or as incompatible or “inconsistent” with them, *id.* at 138, 143, 153; spoke of the Supremacy Clause, *id.* at 151, 153, and the supremacy doctrine of discrimination against federal claims, *id.* at 139, 141, 144; and employed the reverse-*Erie* language of outcome-determinativeness, *id.* at 141, 151. Justice White, concurring, used the preemption language of undermining purposes, *id.* at 156, and the supremacy language of discrimination against the federal claim *id.* Justice O’Connor, dissenting, invoked the language of inconsistency, *id.* at 156, and preemption, *id.* at 157-58, the supremacy language of discrimination, *id.* at 160, and the term “reverse-*Erie*,” *id.* at 160-161.

indulged in such a fantasy,¹⁵⁴ and Justice O'Connor, in her *Felder* dissent, quoted Marshall with relish: “A state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.”¹⁵⁵

Marshall’s remark sounds plausible, and certainly evenhanded. But there are times neutrality has nothing to do with the requirements of the situation. The beneficiary of a right is always the claimant, not the alleged violator of the right. What comes to the rescue of the principle of neutrality here is that the beneficiary of a defense is always the alleged wrongdoer. Thus, in actual conflicts between some federal right and a state procedure, when the state procedure is struck down it is because it is a hurdle to federal relief. So it is interesting to turn to a fairly recent case in which a more liberal state rule of recovery was held preempted by less generous federal law.

(1992) TEX. L. REV. 1787 C. *Analyzing Monessen: Herein of Statutory Construction and Choice of Law*

The 1988 Supreme Court case I am about to ring in is peculiarly a case of our time; less generous federal law seems the wave of our future. Nevertheless this was an old-fashioned personal injuries case under the Federal Employers’ Liability Act (the FELA).¹⁵⁶ At the dawn of this century, before the idea of workers’ compensation took hold, the FELA had given a federal tort of negligence to railway workers, stripped the employer of common law defenses,¹⁵⁷ and given plaintiffs filing suit under the Act an absolute choice between federal and state forums¹⁵⁸ and an inviolable right to trial by jury.¹⁵⁹ The 1988 case under the Act is

154. See *Robertson v. Wegmann*, 436 U.S. 584 (1978) (Marshall, J.) (holding that under the federal civil rights choice-of-law statute, 28 U.S.C. § 1988 (1988), state law governs the survival of federal civil rights claim after the death of the plaintiff).

155. *Felder*, 487 U.S. at 156-157 (O’Connor, J., dissenting) (quoting *Wegmann*, 436 U.S. at 593).

156. Federal Employers’ Liability Act (FELA), ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60, 28 U.S.C. § 1445(a) (1988)).

157. The Act destroys the defenses of assumption of risk, fellow servant, and contributory negligence. 45 U.S.C. §§ 51, 53, 54.

158. The Act provides concurrent jurisdiction and makes cases brought in state courts unremovable. *Id.* § 56; 28 U.S.C. § 1445(a).

159. A right to trial by jury is “part and parcel” of the FELA remedy, *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943), in state courts as well as federal, Dice

Monessen Southwestern Railway Co. v. Morgan.¹⁶⁰ It is not altogether a satisfactory example of the reverse-*Erie* sort of case; it is barely distinguishable from *Howlett*. But it is a good vehicle for further points I want to make about legal reasoning and choice of law, especially on the problem of statutory construction.

In the Supreme Court the issues in *Monessen* were whether the Pennsylvania trial judge erred, first, by instructing the jury under Pennsylvania law not to discount damages to present value, and, second, by awarding prejudgment interest, pursuant to Pennsylvania practice.¹⁶¹ All of the Justices agreed that both issues were necessarily governed by federal law.¹⁶² So although the case is a reverse-*Erie* sort of conflict between federal law and state remedies, the conflict did not give trouble to the Court. The case seemed to become a pure exercise in statutory construction of the FELA. Nevertheless *Monessen* brings to the surface conflicts issues I need to address.

There is a level of abstraction on which one can purport to decide a conflicts case by choosing the sovereign who “governs” that class of cases or issues. Formalists and codifiers prefer choosing law at this lofty elevation, and the choice between federal and state law is most often made on this level of abstraction too. An issue is identified as clearly **(1992) TEX. L. REV. 1788** federal,¹⁶³ or traditionally for the states.¹⁶⁴ One may not even know in a given case what the particular laws of the state or nation are, or even whether they conflict. That does not matter because

v. Akron, C. & Y.R.R. Co., 342 U.S. 359, 363 (1952).

160. 486 U.S. 330 (1988).

161. *Id.* at 332-33.

162. *Id.* at 336, 339 (White, J.); *id.* at 350 (O’Connor, J., concurring and dissenting); *id.* at 342-43 (Blackmun, J., concurring and dissenting).

163. *See, e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 522 (1988) (stating that military procurement is a uniquely federal interest); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-427 (1964) (declaring both foreign relations and the allocation of powers among federal governmental branches to be inherently and uniquely federal questions); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943) (noting that obligations of the United States on its own commercial instruments are matters of intrinsically federal concern).

164. *See, e.g.*, *United States v. Yazell*, 382 U.S. 341, 349, 353 (1966) (describing family law and property law as matters of peculiarly local concern); *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“[T]here is no federal law of domestic relations, which is primarily a matter of state concern.”).

one chooses sovereigns by such a method, not laws. A choice of law becomes incidental to the choice of sovereign. This sort of choice method is generally thought of as “jurisdiction-selecting.”¹⁶⁵ Its great merit, in the view of its proponents, is that it lets justice truly be blind. But the price of blindness is not seeing. It is not necessarily a good thing when justice is blind to the facts, blind to the policies underlying law, and blind to arbitrary or irrational outcomes.

The modern way of choosing law in interstate cases takes place at a much lower level of abstraction, much closer to the particular facts and to the particular laws in conflict. This method is to construe forum law, in light of all the policies of the forum at the time of decision, to see whether forum law rationally applies. This is the ordinary purposive reasoning of the common law. In conflicts cases it is called “interest analysis.”¹⁶⁶ Doing it this way, courts will apply another sovereign’s law only if the forum’s law is not reasonably in point. When the forum has law in point but thinks its law bad, and if the other sovereign’s rule seems a better match than the forum’s to the forum’s actual current policies, the forum sometimes applies the other sovereign’s law. The better view is that in this circumstance the forum should, if possible, adopt the foreign rule as its own.¹⁶⁷

Unfortunately, there is more than one way of doing construction or interpretation. One of these is appropriate to interest analysis. Others are at best auxiliary. The interesting problem in *Monessen* concerned the nature of statutory construction.

1. *The Zero-Discount Issue.*--I want to focus on the issue of prejudgment interest, but for the purpose I need to fill in somewhat **(1992) TEX. L. REV. 1789** on the other issue in *Monessen*--the zero-discount issue. The Pennsylvania trial judge had instructed the jury not to discount damages to present value.¹⁶⁸ In the United States Supreme Court, all of

165. The term was the late Professor Cavers’. See DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 9 & *passim* (1965); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933).

166. See generally VERNON ET AL., *supra* note 2, at 302; Weinberg, *Against Comity*, *supra* note 2, at 58 n. 27 (arguing that interest analysis is the purposive reasoning of the common law).

167. See Weinberg, *Against Comity*, *supra* note 2, at 92-94; Weinberg, *On Departing from Forum Law*, *supra* note 14, at 601-603, 614-618, 626.

168. *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 332 (1988). The trial court’s

the Justices thought this instruction reversible error.¹⁶⁹ This was not merely because the instruction was preempted by any federal law to the contrary, although that was the view of Justices Blackmun and Marshall.¹⁷⁰ The instruction was reversible error because, as the Court has consistently held, the FELA grants an inviolable right to trial by jury.¹⁷¹ The Court reasoned that, by instructing the jury about one rigid formula only--the zero-discount method--the trial judge had taken from the jury the choice among reasonable discount formulae, offending the jury-favoring policies of the FELA. There was an actual conflict here, and the state practice had to give way.¹⁷² Writing separately, Justice O'Connor snowplowed through this reasoning,¹⁷³ but that is not what I want to focus on.

The FELA right to trial by jury, although mentioned in the statute,¹⁷⁴ is not explicitly given there. But the Supreme Court itself has held that the right to trial by jury is “part and parcel of the remedy afforded railroad workers” under the FELA.¹⁷⁵ Note the words “remedy” and “railroad workers.” Repeatedly the Court has held that the FELA right to trial by jury is to “benefit” railway workers, and is a “substantial . . . part of the

judgment was affirmed by the Pennsylvania Superior Court, 489 A.2d 254 (Pa. Super. Ct. 1985) and the Pennsylvania Supreme Court affirmed by a narrow margin, 518 A.2d 1171 (Pa. 1986) (4-3 decision).

169. Justice White’s opinion for the Court was joined by Justices Brennan, Stevens, Scalia, and Kennedy. Justice O’Connor, joined by Chief Justice Rehnquist, dissenting in part, concurred on the point that it was error for the state court to give conclusive effect to the “total offset” method of discounting to present value. *Monessen*, 486 U.S. at 352 (O’Connor, dissenting on this issue).

170. *Id.* at 343 (Blackmun, J., joined by Marshall, J., concurring and dissenting)

171. *See supra* note 159.

172. *Monessen*, 486 U.S. at 341-342.

173. *Id.* at 353-355 (O’Connor, J., concurring and dissenting). Justice O’Connor reasoned that the zero-discount method in itself, had the jury used it, would be a reasonable method. She pointed out that there is no reason the choice of method should be left to the jury; the question is not particularly appropriate for jury determination, since it is not one of fact.

174. *See* 45 U.S.C. § 53 (1988) (providing that contributory negligence shall not bar the statutory action, but that “damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee”).

175. *See supra* note 159.

rights accorded by the Act.”¹⁷⁶ This jurisprudence clearly lodges the FELA right to trial by jury in the injured employee. The employee in *Monessen*, however, was not complaining. He was happy with the charge to the jury. Although the Pennsylvania Supreme Court specifically adopted the zero-discount method for this case as a matter of federal law,¹⁷⁷ it had also previously selected the method **(1992) TEX. L. REV. 1790** for Pennsylvania tort cases precisely because the zero-discount method was rather obviously “the rule that most nearly provides an injured claimant with damages to the full extent of the injuries sustained.”¹⁷⁸ (The state supreme court also reasoned that the zero-discount method was more accurate; inflation and intangible factors would generally more than offset a discount representing the difference between future and present value.¹⁷⁹ Thus, Pennsylvania was not seeking to overcompensate the plaintiff.) Since assuring full damages to the injured employee is a primary goal of the FELA,¹⁸⁰ it is simply nonsense that the plaintiff’s FELA right to trial by jury is offended by a zero-discount instruction.¹⁸¹

Now put the zero-discount issue on hold, and let us have a look at the other issue, the question whether prejudgment interest should be available in a case under the FELA.

2. *The Prejudgment Interest Issue.*--Seven of the Justices thought that the FELA plaintiff was not entitled to prejudgment interest, notwithstanding the availability of such interest under state law.¹⁸² If state law provided prejudgment interest, that was too substantive an augmentation of recovery--in this case, a 20% increase to the total--not to be preempted by federal law to the contrary; and these Justices construed federal law to disallow prejudgment interest. The Court paused briefly on

176. *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 363 (1952).

177. *Morgan v. Monessen S.W. Ry.*, 518 A.2d 1171, 1175 (Pa. 1986), *rev’d*, 486 U.S. 330 (1988).

178. *Id.* at 1174.

179. *Id.* at 1175-76.

180. *See infra* note 203 and accompanying text.

181. The Court did not purport to address the defendant’s Seventh Amendment right to trial by jury.

182. *Monessen*, 486 U.S. at 331 (White, J., for the majority of five); *id.* at 350 (O’Connor, J., joined by Rehnquist, C.J., concurring and dissenting). In contrast, Justices Blackmun and Marshall thought that federal law might be interpreted to provide for prejudgment interest. *Id.* at 345 (Blackmun, J., joined by Marshall, J., dissenting).

the problem of characterizing prejudgment interest as “substantive” or “procedural,” and opined conclusorily, as courts used to do in conflicts cases before they abandoned territorial conflicts rules, that the measure of damages was too bound up with the substantive right to be considered “procedural.”¹⁸³ But, from a more modern perspective, the issue was really one of statutory construction, and the Court saw this.¹⁸⁴

(1992) TEX. L. REV. 1791 It is the process of statutory construction, and the colloquy it generated among the Justices, that makes *Monessen* worth reading. Earlier in this discussion I pointed out that, just as one can choose law at different levels of abstraction, so also one can construe legislation. Justice White’s opinion for the *Monessen* Court is a near-perfect example of statutory construction when it is used to persuade the reader that the result reached is within the actual, original intention of the legislature. Text and history are the characteristic referents for such an inquiry.

On the other hand, Justice Blackmun’s partial dissent is a fine example of a very different mode of statutory construction: purposive reasoning.¹⁸⁵ Such reasoning is used to articulate the likely policies that arguably support the application of the legislation on the particular facts.¹⁸⁶ The “actual intent” method should not be confused with purposive reasoning. Text and history may shed light on the likely policy supports of a statute or rule, but purposive reasoning is fundamentally teleological. Nevertheless, purposive reasoning may seem less manipulable and more persuasive than the actual intent method, perhaps because it is an objective inquiry that makes no assumption about the recoverability of a supposed historic truth, or the existence of an

183. *Id.* at 336; *cf.* *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953) (discussing “built-in” time limitations as qualifying a state statutory right and holding that, as a constitutional matter, state characterization of a rule as “built-in” is irrelevant); *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955) (Harlan, J.) (stating the general rule that where the period of limitation was so bound up with the underlying right as to condition the right, the law that gives the cause of action governs the period of limitation).

184. *Monessen*, 486 U.S. at 336-37.

185. *Id.* at 342 (Blackmun, J., concurring and dissenting).

186. *See* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 507 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986), and defining purposive reasoning as “interpret[ing] legal rules in accordance with the underlying policies or principles they were intended to further”).

identifiable “actual intention” of the legislature. It is the method used in interest analysis of a conflict of laws.

Allow Justice White to try to persuade you through an actual intent analysis. He writes that nowhere does the FELA mention prejudgment interest.¹⁸⁷ He says that few of the many federal cases that have awarded prejudgment interest are statutory cases in which the statute is silent.¹⁸⁸ Above all, he notes that at the time of adoption of the FELA, prejudgment interest was not much known.¹⁸⁹ It is hard to believe, White reasons, that Congress intended to ring into this statute a peculiar remedy like prejudgment interest without mentioning it.¹⁹⁰

Breaking momentarily with this pattern, White purports to have recourse to purpose. The purpose of the statute, White notes, was to dispense with “other common law doctrines of that era, such as the defense of contributory negligence. . . . But Congress did not deal at all with the equally well-established doctrine barring the recovery of prejudgment (1992) TEX. L. REV. 1792 interest. . . .”¹⁹¹ When lower courts failed to award such interest, Congress could have stepped in and changed this situation, but never did. Indeed, only recently Congress declined to authorize prejudgment interest under the general federal interest statute.¹⁹²

The trouble with this analysis is that for the Court to read into a statute like the FELA a ceiling, rather than a floor, is somewhat ahistorical; it seems at odds with the statute’s purposes. The administration of the statute has long been generous, in order to effectuate its humane and liberal purposes.¹⁹³ That such thinking may sound unfashionable in our peculiar political milieu does not change this history. Justice White’s statement of the purposes of the FELA is incomplete. At

187. *Monessen*, 486 U.S. at 336.

188. *Id.* at 339 n. 9.

189. *Id.* at 337.

190. *Id.* at 339.

191. *Id.* at 337-38.

192. *Id.* at 339 n. 8.

193. *See* *Urie v. Thompson*, 337 U.S. 163, 180 (1949) (noting that “humanitarian purposes” and the “accepted standard of liberal construction” of the FELA); *see also* *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 561-562 (1987) (describing the broad remedial nature of the statute).

common law, employees rarely could succeed against employers on a theory of negligence because instead of respondeat superior there was the fellow servant rule; because employees were thought to assume the risk of their employment; and because their own contributory negligence would be an absolute bar to recovery. Thus, in the age of mass production, the common law was putting the risk of statistically inevitable industrial accident on the worker and her or his dependents. In the FELA, Congress stripped defendant employers of these common law defenses, and provided employees with trial by jury and an absolute choice of forum.¹⁹⁴ Thus, in the age of mass production, the common law was putting the risk of statistically inevitable industrial accidents on workers and their dependents. In the FELA, Congress stripped defendant employers of these common-law defenses, and provided employees with their choice of forum.¹⁹⁵ These innovations were scarcely enacted for their own sakes, as Justice White seems content to suggest in his dismissive treatment of the prejudgment interest issue.¹⁹⁶ In the FELA, Congress meant to shift the litigational balance toward plaintiffs, for the purpose of getting recovery to injured railway workers and their dependents, and thus to shift and spread the risk of these industrial accidents.¹⁹⁷ By these means, Congress also sought to promote the safety of those employed in interstate rail commerce.¹⁹⁸ It is true that the FELA plaintiff must still bear a burden of showing fault.¹⁹⁹ That may be explained by the novelty of no-fault workers' compensation at the time of enactment,²⁰⁰ and the **(1992) TEX. L. REV. 1793** doubts in those days about the constitutionality of workers' compensation.²⁰¹ As a practical matter courts understanding the purposes

194. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 80, at 568, 569, 571-72 (5th ed. 1984).

195. See *supra* notes 156-60 and accompanying text.

196. See *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 337-38 (1988); *supra* text accompanying note 191.

197. *Shenker v. Baltimore & O.R.R.*, 374 U.S. 1, 10-11 (1963); *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958).

198. See *Minneapolis, St. P. & S. Ste. M. Ry. v. Rock*, 279 U.S. 410, 413 (1929).

199. 45 U.S.C. § 51 (1988).

200. The FELA was enacted in 1908. See *supra* note 156. The constitutionality of workers' compensation laws was settled only in 1917. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

201. KEETON ET AL., *supra* note 194, § 80, at 574-75.

of the FELA historically have required only a very modest showing of fault.²⁰² Current policy supports of the required showing of employer fault might include a wish to protect the employer from more absolute liability; but such boundary policies are hardly the primary purposes of the legislation. As to damages, the FELA long has been administered to provide full damages to plaintiffs.²⁰³

That is an important point about full damages. The use of money is worth something. If plaintiffs are put out of pocket for wages, medical expenses, or the lost contributions of family members who must tend them, that money is worth something to them from the date they expend it to the date they are compensated for it. Thus, prejudgment interest, at least with respect to pecuniary losses, is an item of compensatory damages.²⁰⁴ It makes scant sense to construe a statute like the FELA so as to remove this item of damages from those damages otherwise recoverable. By insisting that federal law be less generous to the plaintiff than state, the Court in *Monessen* stands on its head a profoundly remedial law. The Court reads a federal statutory right to full damages as a *defense* to full damages. Although Justice Blackmun, dissenting on the point, saw no reason to disallow prejudgment interest if the state would allow it, and thus would have “chosen” state law on this issue, the better view, also articulated by him, is that prejudgment interest is allowable under federal law.²⁰⁵

Blackmun raised a further policy argument in support of this view. The disallowance of prejudgment interest is a windfall to the defendant railway, he reasoned.²⁰⁶ The railway has had the use of money which it, the railway, is now held to have owed to the plaintiff. Interest should be paid for the use of money. A failure to award prejudgment interest would

202. *See, e.g., id.* at 579 (noting the impact of a series of decisions in which “the question of the railroad’s negligence went to the jury although the evidence bearing upon it was circumstantial, sketchy, or the omission or departure from ordinary care was very slight”).

203. *Monessen*, 486 U.S. at 343 (Blackmun, J., concurring and dissenting).

204. *See Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (stating, shortly after *Monessen*, that prejudgment interest is “an element of complete compensation” (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987))).

205. *Monessen*, 486 U.S. at 345 (Blackmun, J., dissenting).

206. *Id.*

encourage defendants to stall²⁰⁷ rather than come forward with a fair settlement of the plaintiff's claim. Yet the policies underlying the FELA presumably include encouraging defendants to come forward quickly to supply injured plaintiffs' needs.

(1992) TEX. L. REV. 1794 Amusingly, Blackmun pointed out that the Court had just insisted, on the zero discount issue, that the plaintiff's lost income stream be reasonably reflected in any formula suggested to the jury for calculating it. "It is hard to see how the Court can recognize that the meaning of 'damages' under the FELA requires that future lost earnings be discounted to present value, but fail to recognize that the same term encompasses a mandate that past lost earnings be increased to present value. . . ." ²⁰⁸ Blackmun added that the Court had recognized as much in its leading case on discounting FELA damages.²⁰⁹

But Justice Blackmun would limit prejudgment interest to pecuniary losses only, and thus far we, too, have discussed only pecuniary losses as items of damages. Blackmun thought the argument for interest on pain and suffering too "speculative."²¹⁰ Whatever Justice Blackmun meant by this, certainly the plaintiff could not invest pain and suffering, as he might have invested the money expended on special damages. Thus no interest on investment would seem to attach to pain and suffering.

Although this argument flies in the face of Blackmun's own policy argument, that a failure to impose a charge for the defendant's use of money will encourage stonewalling, it does sound reasonable--as long as one takes the view that prejudgment interest is an item of compensatory damages. But another view of prejudgment interest might be that it is more restitutionary in nature. In this view, prejudgment interest is not awarded to compensate for lost investment opportunities; the plaintiff does not, after all, invest all her wages and contributions. Rather, prejudgment interest reflects the defendant's use of money--money which the defendant is now held to owe to the plaintiff. For this purpose, pecuniary damages

207. *Id.*, at 345 n. 2.

208. *Id.* at 348.

209. *Monessen*, 486 U.S. at 349, (Blackmun, J., concurring and dissenting) (citing *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 538 n. 22 (1983)).

210. *Id.* at 347-48.

cannot be distinguished from damages for pain and suffering, which the defendant is also now held to owe to the plaintiff.²¹¹

A counterweight to my argument is that it might be thought to raise the question whether a jury should be instructed to discount to present value all damages, including pain and suffering.²¹² It would seem, as Justice Blackmun argued in his *Monessen* opinion, that it is not possible to (1992) TEX. L. REV. 1795 distinguish between the idea of discounting damages to present value, and the idea of awarding prejudgment interest. Both processes are attempts to render a more accurate picture of the stream of damages before and after trial. But Blackmun was careful to make that argument only for pecuniary losses. He distinguished pain and suffering as being too “speculative” for an award of prejudgment interest. Now, I have argued here that, for purposes of restitution of the defendant’s unjust enrichments through an award of prejudgment interest, pain and suffering cannot be distinguished from pecuniary damages. But on the issue whether pain and suffering should be discounted to present value, it seems to me that pain and suffering *can* be so distinguished.

When prejudgment interest is awarded, it is awarded by the court, using a statutory or other arbitrary interest rate, based on an integrated finding of fact by the jury. But when damages are discounted to present value in FELA cases, it is the jury that does the discounting. When the jury discounts future pecuniary losses, its baseline is a fairly hard final calculation of dollar quantities which, if not always actuarially predictable, can be reasonably estimated. Actual dollar estimates will have been put in evidence. But if a jury were to discount to present value future pain and suffering, its baseline would be very different. The baseline for its discounting calculation would be an unexplainable final figure it has arrived at through a tacit, gut weighing of factors it intuitively and collectively feels relevant, including the speculativeness--to transfer Blackmun’s characterization to this context--of future suffering. It is

211. See, e.g., *Nevada v. Eaton*, 710 P.2d 1370, 1374 (Nev. 1985)(holding that the plaintiff in a personal injury action against the state is entitled to prejudgment interest on the entire amount of damages, including pain and suffering); *Timmons v. Royal Globe Ins. Co.*, 713 P.2d 589, 593 (Okla. 1985) (holding that plaintiff in an action against an insurer for bad-faith dealing is entitled to statutory prejudgment interest for personal injuries including “embarrassment and mental suffering”).

212. I am indebted to my colleague Doug Laycock, who, in reading the foregoing analysis, raised this further question with me. See DOUGLAS M. LAYCOCK, *MODERN AMERICAN REMEDIES* 29-30 (Supp. 1990). The suggestion, however, should be rejected. See my argument in the text.

unlikely that any dollar quantities will have been put in evidence. At most the jury will have had only rule-of-thumb guidance. There is an obvious danger of double-counting here that would warrant shielding pain and suffering from (another) discount to “present value.” That danger does not exist in the case of an award of prejudgment interest, which is a mechanical compensation by the court for the use of money owed in an amount already determined by the jury. Thus, to instruct a jury to discount to present value even those damages representing pain and suffering would seem to be imprudent. The instruction would seem to be particularly unsuitable in an FELA case, given the FELA’s historic liberal administration, rooted as it is in the statutory intention to shift the litigational balance more equitably toward full recovery for injured railway workers.

3. *An Apparent Conflict.*--These policy analyses of the statute on the particular facts strongly suggest that the *Monessen* Court was simply wrong on the prejudgment interest issue. But that does not mean that state law should have applied. I think we can see, from our policy discussion of the prejudgment issue in *Monessen*, that on this issue the case actually was one of only apparent conflict, to borrow analogous thinking from the theory of interstate (1992) TEX. L. REV. 1796 conflicts.²¹³ The *Monessen* Court ought to have seen the national interest in favor of prejudgment interest, and thus ought to have seen that there was no conflict between federal and state law. Nothing in the federal statute read to the contrary, and the general thrust of FELA jurisprudence strongly suggested that courts should recognize the availability of prejudgment interest in FELA cases.

But I do not argue that Pennsylvania law should have been borrowed for the case. Federal law “governs” FELA cases, and the federal common law of these negligence actions should have developed, in *Monessen*, to include this item of damages.

Monessen furnishes an example of the reverse-*Erie* cases, more generally of the “supremacy” line of cases; but it is something more. It lies somewhere between the “actual” conflict cases²¹⁴ and the more

213. Cf., e.g., *People v. One 1953 Ford Victoria*, 311 P.2d 480, 482 (Cal. 1957) (reasoning that the forum statute could not reasonably be construed as applicable); Harold W. Horowitz, *The Law of Choice of Law in California--A Restatement*, 21 U.C.L.A. L.REV. 719, 744 (1974) (describing apparent true conflicts as “false conflicts”).

214. See *supra* text accompanying notes 36-37.

abstract “inchoate” conflict cases.²¹⁵ In *Monessen*, the Court presumes there is exclusive federal legislative competence, but it fails to seek and thus to find what federal policy is.

In *Monessen*, then, the requirements of national policy needed to be divined in the silence of the statute and in the teeth of a long line of cases failing to see the issue. The consequence of the Court’s failure to find and declare national policy is the fashioning of a rule for FELA actions that seems simply wrong.

VIII. Envoi

In this Article, I have tried to show how the federal-state conflict of laws is not so very different from the interstate conflict of laws. A unified theory is not beyond reach. In both contexts choice of law depends on governmental interests, and in both contexts choice of law is intimate interpretation of law. It is not possible to reach intelligent conclusions about governmental interests without close policy analysis. Legal reasoning of the kind we have been doing--close policy analysis--identifies these interests, and tests the existence of conflict. Even what the law “is” is open to question, and cannot be answered without construction or interpretation; *Monessen* displays this characteristic ambiguity.

We can also see more clearly that there is little need for the separate lines of authority behind the cases we have reviewed. It does not capture what all these cases are about to put them into their present leaky (1992) **TEX. L. REV. 1797** pigeonholes of conflict preemption, supremacy, and reverse-*Erie*. They are all more cleanly identified as “actual” federal-state conflicts. The specialized accretions of doctrine peculiar to each category may serve analytic functions that would be served better if courts took into account--when dealing with a conflicts issue, through purposive analysis of legislation or case law--all the nation’s governmental interests in the particular issue, on the particular facts, at the time of decision.

If, in these actual conflict cases, the fact of federal supremacy seems to yield federal law, and to do so more consistently than a presumption in favor of state law might seem to justify, there is a reason for that. The Supremacy Clause is a sleeping giant in our polity. We have seen that the presumption in favor of state law resides in the ordinary condition of dual governance: the American dual law system. State law comes into the

215. See *supra* text accompanying notes 38-44.

cases to measure the scope of possible conflict. But once actual conflict is determined to have disturbed the intersystemic harmony, the presumption of dual governance is overcome. The Supremacy Clause then comes into play, requiring federal law. To impose some additional choice of law process on the “actual” conflict case would be to raise a second presumption against displacement of state law, and to sap the constitutional imperative of federal supremacy. Again, there is a rough analogy from modernist choice of law theory for interstate cases: the phenomenon of forum preference. The interested forum should, and generally does, apply its own law. In very similar fashion, all courts should, and generally do, apply the law of the nation when the national interest so requires.

There may be further concerns of comity and federalism; these would be national, not state, concerns, and might be thought appropriate for consideration when they have special bearing on the facts of a particular case. But such concepts, in the end, are judicial constructs, and judicial constructs only for the special case; they cannot be interposed presumptively between the Supremacy Clause and the effectuation of national policy. To allow that would be to drain the Supremacy Clause of virtue.

In federal-state as in interstate conflicts, then, it is hard to avoid the conclusion that there should be no abstract choice of law process. Interest analysis is simply ordinary substantive legal reasoning. It is careful interpretation of substantive law and policy: in the interstate case, the law and policy of the forum; in the federal-state case, of the nation. The question is whether or how the law applies; and there should be no legitimate question whether to apply another sovereign’s law. This last question becomes, rather, to what extent, and how, the court might try to effect change.

But if we were to turn to “inchoate” conflicts between latent federal power and state law, much more complex and interesting questions would **(1992) TEX. L. REV. 1798** arise. When should a court federalize an issue until then governed by state law? When should it hold that federal governance must be exclusive? When allow the state to continue governing of its own force? Can we derive theoretical help for thinking about the “inchoate” conflicts from false conflict theory, as we have derived help for thinking about “actual” conflicts from true conflict theory? When, in the exercise of perceived federal power, should a court fashion common law? When, in the exercise of perceived federal power,

should a court nevertheless prefer state law? “Borrow” it? Or, refusing to fashion federal law, hold state law in some way residually controlling, as it were, by default? But these engrossing questions, falling outside my subject of “actual” federal-state conflicts, must be left for future work.