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The Silent Sovereign: Tipping the Scales in Reverse-*Erie* Applications of Indian Law

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INTRODUCTION

A central tenet of the American justice system, as embodied in the fundamental idea of *stare decisis*, is predictability. The knowledge that a decisionmaker, when confronted with similar facts, will decide the present case in the same way as the last allows parties to better navigate the legal system[1] and channel their behavior.[2] Though conflict of laws scholars have struggled to persuade judges that choice-of-law methodologies should matter as much as substantive law,[3] the ability to predict which law will govern a dispute is just as important for avoiding uncertainty in litigation. When the choice between two available bodies of law will affect the ultimate disposition of a case, the process for arriving at that choice becomes even more critical.[4]

The proposition that so-called "outcome-determinative" choice-of-law determinations are significant to our legal system is supported by the widespread teaching of the *Erie* doctrine.[5] Although civil suits based on diversity jurisdiction make up only a fraction of the cases that appear in federal court,[6] first-year law students are consistently made to learn the framework for choosing between state and federal law under those circumstances. In contrast, the law school curriculum gives students little exposure to *Erie*'s state court counterpart, affectionately termed "reverse-*Erie*."[7]

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1 Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

2 Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1151 (2000).

3 Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951–52 (1994).

4 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (holding that procedural rules that create an outcome not "substantially the same . . . as it would be if tried in a [different] court," should be treated the same as substantive laws under the *Erie* doctrine). *See* discussion *infra* Part I.A.1.

5 *See* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 50 & n.198 (2006) (discussing the coverage of the *Erie* doctrine across Civil Procedure courses).

6 For the twelve-month period ending June 30, 2011, diversity suits (101,508) made up 28 percent of the total cases (368,394) filed in United States district courts. OFFICE OF JUDGES PROGRAMS STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: JUNE 30, 2011, at 29, 45 (2011), *available at* http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/June2011.aspx.

7 For a discussion of reverse-*Erie* coverage in American law schools, see Clermont, *supra* note 5, at 51–54. Clermont opines that reverse-*Erie* is given scant treatment in civil procedure courses due either to national law schools' focus on federal law or to the mistaken belief that reverse-*Erie* will be covered in federal jurisdiction courses or in constitutional law as part and parcel of the preemption doctrine. *Id.* at 51–53.

From its name alone, one might expect reverse-*Erie* determinations to follow an established *Erie*-like framework.[8] In accordance with *Erie* case law, one might also expect the majority of cases involving borderline substantive-procedural questions to result in application of the law of the forum (i.e., federal rules in federal courts and state rules in state courts).[9] Reverse-*Erie*'s close relation to preemption would also support such an inference because preemption analysis begins with a presumption against preemption—that is, in favor of state law.[10]

In practice, however, reverse-*Erie* is not merely an analog of the *Erie* doctrine, nor is it a subsection of preemption;[11] reverse-*Erie* differs from those doctrines in that the ultimate choice of law is unpredictable. The inartful "balancing" of state and federal interests in reverse-*Erie* cases—as opposed to the use of an *Erie*-like framework—often results in the application of federal law[12] without meaningful explanation to help parties understand how their choice-of-law issues will be decided in the future. And while federal supremacy is not without its place in the overall choice-of-law methodology, it is misplaced in the reverse-*Erie* analysis.

Part I of this Comment describes the framework that the Supreme Court has supplied for deciding the applicability of state and federal rules in the contexts of *Erie*, preemption, and reverse-*Erie*. Part II explores the lopsided results achieved under the current reverse-*Erie* paradigm and proposes an explanation for the apparent bias towards the federal sovereign: premature considerations of preemption come into play when state courts decide whether the rule they are

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[8] *But see id.* at 13 (arguing that there is little agreement about what is the proper methodology for determining *Erie* problems); Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1255–63 (1999) (describing four different methodologies for choosing between state and federal law).

[9] Of the five *Erie* cases heard by the Supreme Court after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), only one has resulted in the application of state law. *See York*, 326 U.S. 99; *see also* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–38 (1958) (suggesting that when court functions would be disrupted otherwise, the rule of the forum should be favored).

[10] *E.g.*, Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1156 (1998).

[11] Clermont, *supra* note 5, at 8.

[12] *Id.* at 38 ("[R]everse-Erie is a more intrusive doctrine in terms of results realized in the real world: in that middle area between state and federal substantive law, state courts must apply federal procedural law to federally created claims more extensively than federal courts must apply state procedural law to state-created claims.").

examining is substantive or procedural.[13] After proposing a new framework for choosing the applicable body of law, one that more closely resembles a mirror image of the *Erie* framework, this Comment looks to decisions in Indian law to illustrate the problems produced by the current reverse-*Erie* paradigm and how they might be cured under the proposed framework. The tension between state and federal law is made all the more obvious when a third sovereign, a tribal nation, is thrown into the mix. While a choice-of-law methodology that produces predictable results better serves all litigants, its benefits become particularly clear when it affects a group that been historically disadvantaged in accessing the American justice system.

I
THE DOCTRINES

For those who have forgotten the days of civil procedure or have foregone the doctrines entirely, the following section contains basic overviews of *Erie*, preemption, and reverse-*Erie*. While experts disagree about the proper application of these doctrines,[14] they generally agree about the aim: to settle disputes over application of federal versus state law while limiting interference with each sovereign's interests.[15] Implicated in these determinations are notions of federalism and comity, leaving each court system free to fashion its own rules of practice and procedure, but requiring it to apply the substantive law of the sovereign whose cause of action is being adjudicated. The decision is more difficult, however, when the rule at issue is not so easily categorized. The landmark Supreme Court cases discussed below serve as guidance for determining whether those borderline rules should be treated as substantive or procedural.

A. State Law in Federal Court

The Constitution delegates to the several states the authority to make the substantive law enforced within their own borders.[16] In overruling almost a century of federal jurisprudence, the Supreme Court held in its 1938 *Erie* decision that a federal court applying its own notions of "general" law to a diversity case amounted to an

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13 *See* discussion *infra* Part II.B.

14 *See supra* note 8.

15 *See, e.g.*, Clermont, *supra* note 5, at 14.

16 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

unconstitutional invasion of that authority.[17] In a seemingly unsympathetic opinion that left the wounded plaintiff without redress,[18] the Court stressed its intent to cure a more generalized harm: the danger of forum shopping and discriminatory application of the laws.[19] *Erie* clarified that the Rules of Decision Act's directive to federal courts sitting in diversity to apply state substantive law was binding whether that law was statutory or judge-made. What was not clear, however, was to what extent federal courts were bound by state rules of practice and procedure.

1. Erie *Under the Rules of Decision Act*

Subsequent *Erie* cases made clear that seemingly procedural state rules should be treated as substantive if they would produce a different result in federal court than if the same claim had been adjudicated in state court. In *York*, the Supreme Court considered whether a federal court sitting in diversity was required to apply the same statute of limitations applicable to an equity action in state court.[20] Without categorizing statutes of limitation as either substantive or procedural, the court noted that "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created [sic] right vitally and not merely formally or negligibly."[21] As such, rules that would produce a substantially

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[17] *Id.* at 79–80.

[18] CIVIL PROCEDURE STORIES relates the tragic factual background behind the *Erie* decision: the plaintiff, Tompkins, was a twenty-seven year old laborer who had recently lost his job, like so many others suffering through the Great Depression, at the local stove works. One evening, while returning from a visit to his sick mother-in-law, Tompkins was struck by the door of a passing train as he walked along the well-tread foot path next to the tracks. Tompkins awoke hours later in a hospital bed to find that his right arm had been amputated, exacerbating his struggle to pay his family's already accruing bills. Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics and Social Change Reshape the Law, Clermont, in* CIVIL PROCEDURE STORIES 21, 35–39, 63–64 (Kevin M. Clermont ed., 2004). Under the prevailing state precedent, Tompkins was classified as a trespasser and therefore was not entitled to compensation by the railroad unless he could prove that they had acted with recklessness or wanton disregard. Tompkins' lawyers brought the claim in federal court, hoping to capitalize on the *Swift* doctrine's grant of authority to federal judges to draw from "general principles." *Erie*, 304 U.S. at 70, 84. Whatever legal scholars may conceive of *Erie*, it represented an unpredictable and unfortunate result for Tompkins, who was then left to the harshness of the state common law.

[19] *Erie*, 304 U.S. at 74–78 (citing Swift v. Tyson, 41 U.S. 1 (1842)).

[20] Guaranty Trust Co. v. York, 326 U.S. 99, 109–10 (1945).

[21] *Id.* at 110.

different outcome in federal court should be treated as substantive.[22] *York*'s holding was later eroded by *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[23] but the Supreme Court revived the outcome-determinative test in *Hanna v. Plumer*, qualifying that "outcome-determinative" must be viewed in reference to "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws."[24]

However, even outcome-determinative rules that would promote forum shopping or result in discriminatory application of substantive law must pass the Supreme Court's mandated balancing test. In *Byrd*, the Court added a requirement for the lower courts to balance "countervailing considerations" of strong federal interests against "the objective that . . . litigation should not come out one way in the federal court and another way in the state court."[25] In that case, a South Carolina rule granting judges the authority to rule on immunity defenses was outcome-determinative in a *York*-sense.[26] However, the Supreme Court held that the state's interest in uniform adjudication of its workmen's compensation claims was subordinate to the federal interest in protecting the Seventh Amendment's allocation of functions between judge and jury.[27] In *Gasperini v. Center for Humanities, Inc.*, the Court then announced that both sovereigns' interests should be simultaneously accommodated whenever possible—in that case, doing so by imposing the state's standard of review for damage awards at the trial level while maintaining the federal standard of review at the appellate level.[28]

2. Erie *Under the Rules Enabling Act*

Federal interests are presumed to be particularly strong where Congress, through the Rules Enabling Act, has authorized federal courts to operate under their own rules of procedure. In *Hanna v. Plumer*, the Court was faced with deciding between a state law and a Federal Rule of Civil Procedure.[29] If the Federal Rule was in "direct

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[22] *Id.*

[23] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958).

[24] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[25] 356 U.S. at 537–38.

[26] *Id.* at 536–37.

[27] *Id.* at 537–38.

[28] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437–39 (1996). It remains to be seen how *Gasperini* will affect future *Erie* analyses, however, as the accommodation principle has only been applied within the realm of remittitur and jury awards.

[29] 380 U.S. at 461.

conflict" with the state law, the Court effectively mandated a presumption in favor of the Federal Rule for two reasons: first, its enactment evidenced a strong federal interest; second, the Rules Enabling Act, which authorized Congress to enact the Federal Rules, was not at odds with the Rules of Decision Act relied upon in *Erie* to vindicate state courts' right to "make" law.[30] In the latest *Erie* case before the Supreme Court, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the plurality opinion reaffirmed a presumption in favor of the Federal Rules.[31]

This presumption in favor of the Federal Rules can be rebutted, however, when the Rule does not "really regulate[] procedure" but rather functions as substantive law.[32] In his concurrence to *Shady Grove*, Justice Stevens recognized a limit on application of the Federal Rules: when the procedural rule "is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[33] Though no Federal Rule to date has been struck down under this hurdle of *Erie*, Stevens' directive[34] functions as a *Byrd*-like balancing test that contemplates the states' constitutionally-granted right to create their own substantive laws.

The resulting *Erie* framework features two routes for vertical choice-of-law determinations in diversity actions. In the first, arising under the Rules Enabling Act, the court should consider whether the relevant Federal Rule of Civil Procedure directly conflicts with the state procedural rule. In the second, arising under the Rules of Decision Act, a federal court must inquire whether application of the federal law is outcome-determinative within the meaning of *Erie*'s twin aims and whether there are any countervailing considerations indicating a strong federal interest in favor of application of the federal law.

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30 *See id.* at 471–74.

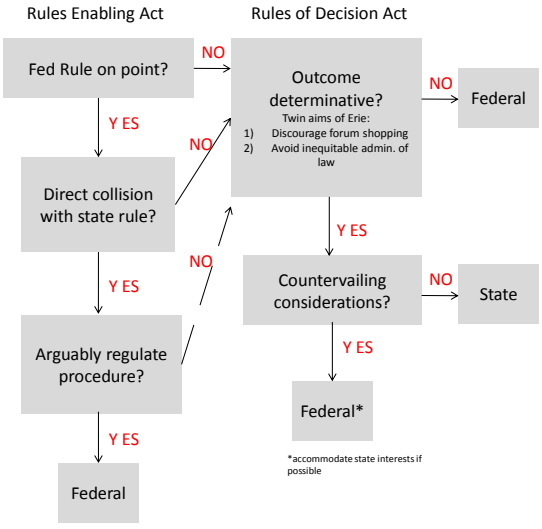
31 Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010).

32 *See id.* at 1452–53 (Stevens, J., concurring in part and concurring in judgment).

33 *Id.* at 1452.

34 When a case results in a plurality decision, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion). Thus, the test articulated in Stevens' concurrence should govern in future Erie situations.

FIGURE 1. *Erie* Doctrine



B. Federal Procedure in State Court

Like a mirror-image of *Erie*, the reverse-*Erie* doctrine comes into play when parties choose to litigate a federal cause of action in state court. The question then becomes whether the court should displace state law in favor of existing federal law in hearing such claims. The answer is simple if the Constitution or Congress has explicitly made federal law applicable.[35] In the absence of such a directive, courts look to congressional intent to implicitly preempt state law as well as "a federally mandated judicial choice-of-law methodology similar to . . . *Erie*."[36]

1. Preemption for Beginners

Courts and scholars often phrase their reverse-*Erie* analysis under the paradigm of implied preemption.[37] In two of the four landmark

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[35] Clermont, *supra* note 5, at 20.

[36] *Id.*

[37] *See, e.g.*, Felder v. Casey, 487 U.S. 131 (1988); Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1784–86 (1992). A state law may also be preempted under the theory of field preemption if "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). While field preemption is not relevant to the analysis herein, it is worth mentioning that field preemption and conflict preemption occasionally overlap when the

reverse-*Erie* cases, even the Supreme Court phrased its analysis in terms of preemption.[38] While the two methods are closely related—both involving a choice between federal and state law—the reasoning behind these choices, as well as their consequences, differs.

First, it is appropriate to designate a state law as "preempted" in only two situations: when federal law contains an explicit preemption clause or when the relevant state law actually conflicts.[39] Assuming that Congress has not expressly preempted state law, preemption analysis begins with a presumption against preemption—that is, in favor of state law.[40] To overcome this presumption, the court must find a conflict between the state and federal law. Such a conflict exists only if "compliance with both federal and state regulations is a physical impossibility"[41] or if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[42] Where state and federal law contradict each other, the Supremacy Clause compels the judiciary to apply federal law.[43]

Of all the preemption doctrines, so-called "obstacle preemption" is perhaps the most controversial. Under traditional conflict preemption, courts can rationally displace state law by imputing to Congress an intent to protect federal law from being nullified and "the policies and purposes reflected in its enactments undermined by the application of state law";[44] by comparison, the basis for obstacle preemption can

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federal interest, like that of immigration, is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2098–99 (2000) (citing Hines v. Davidowitz, 312 U.S. 52 (1941)) ("[A]lthough . . . *Hines v. Davidowitz* . . . is cited as the classic articulation of obstacle preemption, *Hines* may be better understood as a field preemption case because the opinion relied on the uniquely national nature of regulating aliens to hold that state laws on the same subject are displaced." (citations omitted)).

38 *See infra* Part II.B.2.

39 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).

40 *E.g.*, Johnson v. Fankell, 520 U.S. 911, 918 (1997); Jordan, *supra* note 10; Federal laws, 16 AM. JUR. 2D *Constitutional Law* § 55 (2009).

41 Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963). *But cf.* Gasperini v. Ctr. for Humanities. Inc., 518 U.S. 415 (1996) (requiring that state and federal interests be accommodated simultaneously whenever possible under the *Erie* doctrine).

42 *Hines*, 312 U.S. at 67; Nelson, *supra* note 39, at 228.

43 "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

44 Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 740 (2008).

appear to be vague and farfetched.[45] Because courts extend the typical notion of conflict preemption to "cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law,"[46] obstacle preemption seems to leave room for judges' subjective ideas of fairness within the analytical framework. Displacing state law under such circumstances conflicts not only with federalism but also with separation of powers ideals.

Instead, the Supreme Court has mandated that the judiciary's role in preemption is limited to ferreting out congressional intent.[47] Before declaring that a state law stands as an "obstacle" to the purposes of Congress, the court must first identify Congress's objectives.[48] Determining the presence of an actual conflict often entails consideration of whether Congress intended to set exclusive standards or merely minimum standards—a floor on which the states may impose more stringent controls.[49] Under obstacle preemption, even after identifying the indicia of congressional intent, courts risk leaving the impression that such identification is merely a pretext for individual judges' preferences.[50]

Lastly, the consequences of preemption should warn courts to take care in their analyses. Due to the implication of the Supremacy

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[45] *See id.* at 739 (noting that the tension between state and federal law is "sharper" under conflict preemption than obstacle preemption); Nelson, *supra* note 39, at 228–29 (stating that the second test is broader, leading many to question whether the current approach "risk[s] displacing too much state law").

[46] Nelson, *supra* note 39, at 228–29.

[47] Cal. Fed. Sav. & Loan Assoc. v. Guerra, 479 U.S. 272, 280 (1987) ("In determining whether a state statute is pre-empted [sic] by federal law and therefore invalid under the Supremacy Clause of the Constitution, [the court's] sole task is to ascertain the intent of Congress."); *see also* Clermont, *supra* note 5, at 7 & n.27 (citing Nelson, *supra* note 39, at 226). *But see* Dinh, *supra* note 37, at 2099 ("The fact that displacement by federal common law and the dormant Commerce Clause are on this spectrum—that state laws can be preempted without any congressional action—suggests it is not entirely correct to state that '"[t]he purpose of Congress is the ultimate touchstone" in every preemption case.'" (alteration in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)).

[48] Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 387 (2011).

[49] *See, e.g.*, *Guerra*, 479 U.S. at 285 (finding a California law that granted a right to reinstatement to pregnant women was not preempted because "Congress intended the [Pregnancy Discrimination Act] to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise'").

[50] Sharpe, *supra* note 48; *see also* Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 178 ("When the Court or administrative agencies face preemption questions, they are therefore left to piece together Congress's intent from available evidence or, as is more often the case, fill in the gaps with their own views on federalism, corrective justice, and regulatory efficiency.").

Clause, a finding that a state procedural rule is preempted invalidates that rule in *all* future cases, not just similar reverse-*Erie* situations involving the same federal cause of action.[51] Thus, an erroneous determination that a state law is "preempted" can have dangerous consequences, both for the future application of that law and for parties' ability to predict the outcome of future reverse-*Erie* inquiries.

*2. Introduction to Reverse-*Erie

The true reverse-*Erie* situation is one in which the relevant state and federal laws do *not* conflict, but rather must be selected to favor "the law of the sovereign whose functions would be more impaired by nonapplication."[52] Because of preemption and the obvious influence of the Supremacy Clause when state and federal laws do conflict, the analog of the Rules Enabling Act route to *Erie* analysis should not be at issue in reverse-*Erie* cases.[53] What is left, essentially, is the mirror-image of *Erie*'s Rules of Decision Act route: a balancing test. Though the current framework is unsettled, the four landmark cases discussed below are instructive for deciphering the Supreme Court's approach to reverse-*Erie*.

Much like *Erie*'s outcome-determinative inquiry, reverse-*Erie* dictates that seemingly procedural rules should be treated as substantive if they affect the ultimate disposition of the case.[54] In a strikingly *York*-like opinion, the Supreme Court struck down a strict Georgia pleading standard in *Brown v. Western Railway of Alabama* because it completely barred recovery that would have been available to the plaintiff if he had brought his Federal Employers' Liability Act (FELA) claim in federal court.[55] At the trial level, the court sustained the defendant's demurrer, finding that the complaint did not set forth a cause of action, and dismissed with prejudice pursuant to a Georgia law making dismissal a final adjudication barring recovery in any future proceeding.[56] Noting that the state courts were usually "free to follow their own rules of 'practice' and 'procedure,'" the Supreme Court held that the federal pleading standard was applicable to ensure

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[51] 16 AM. JUR. 2D *Constitutional Law* § 55 (2009).

[52] Clermont, *supra* note 5, at 14.

[53] *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1999)).

[54] Johnson v. Fankell, 520 U.S. 911, 921 (1997).

[55] Brown v. W. Ry. of Ala., 338 U.S. 294, 294, 299 (1949).

[56] *Id.* at 295.

"uniform application of the federal act in the state and federal courts."[57] The Court reaffirmed the outcome-determinative test in *Felder v. Casey*, displacing Wisconsin's notice-of-claim statute under a theory of obstacle preemption, but citing as its reasoning that enforcement would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim [was] asserted in state or federal court."[58]

The Supreme Court will also treat as substantive any rule that is so intertwined with a federal substantive right that it functions to define the scope of that right.[59] Though *Felder* has been cited as the source of the outcome-determinative test discussed above,[60] the notice-of-claim statute at issue in that case was arguably not outcome-determinative in the *York*- or *Brown*-sense because the provision encouraging pre-suit settlement[61] would not affect the ultimate disposition of the case[62]—parties amenable to suit could opt to settle at any point in the proceedings, and had the governmental agency been unwilling to settle for the requested amount, the complaint would have proceeded in exactly the way it did in *Felder*. Rather, what was more critical to the Court's analysis was that the state's notice-of-claim statute effectively conferred an additional affirmative defense on the governmental defendants, thereby "'defining and characterizing the essential elements of a federal cause of action.'"[63] *Dice v. Akron, Canton & Youngstown Railroad Co.* also resulted in application of federal law where the Court determined that the jury's resolution of factual issues was "too substantial a part of the rights accorded by the [Federal Employers' Liability] Act" to be dismissed as merely procedural.[64]

Lastly, the Court has mandated a balancing test for rules deemed substantive under either of the foregoing tests. In *Felder*, the Court

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[57] *Id.* at 295–96.

[58] Felder v. Casey, 487 U.S. 131, 138 (1988).

[59] *Cf.* Shady Grove Orthopedic Assocs., P.A., 130 S. Ct. 1431, 1452 (Stevens, J., concurring in part and concurring in judgment).

[60] *See, e.g.*, Johnson v. Fankell, 520 U.S. 911, 921 (1997).

[61] The notice of claim statute required the party seeking redress to submit an itemized statement of the relief sought and gave the recipient agency 120 days to grant or disallow the requested relief. *Felder*, 487 U.S. at 137 (citing WIS. STAT. § 893.80(1)(a)–(b) (1983 & Supp. 1987)).

[62] *See Johnson*, 520 U.S. at 921 ("'[O]utcome,' as we used the term [in *Felder*], referred to the ultimate disposition of the case.").

[63] *Felder*, 487 U.S. at 144 (quoting Wilson v. Garcia, 471 U.S. 261, 269 (1985)).

[64] Dice v. Akron, Canton & Youngstown R.R, Co., 342 U.S. 359, 363 (1952).

weighed the state's primary interest in enforcing the notice of claim statute (to minimize liability and the expenses associated with it) against the federal interest in assuring that a plaintiff's ability to recover for civil rights violations was not hindered by rules that favored the same agencies responsible for those violations.[65] Even the state's less nefarious secondary interest in prescribing prompt corrective measures was deemed subordinate to federal interests.[66]

Conversely, strong state interests can function as *Byrd*-like countervailing considerations. In *Johnson*, to determine whether the state's finality rule barred defendant's interlocutory appeal on the issue of qualified immunity,[67] the Court balanced the interference with federal interests[68] against competing state interests in limiting interlocutory appeals.[69] Noting that the state's final judgment rule did not discriminate against the federal right since it applied equally to state personal injury actions,[70] the Court determined that the application of the state rule was appropriate because the state's interest in the operation of its courts outweighed the defendant-officials' interest in avoiding the burdens of litigation.[71]

In the wake of these cases, the resulting methodology seems to embrace many *Erie*-like qualities. Resembling *Erie*'s Rules Enabling Act route, preemption analysis takes hold first, resulting in application of federal law automatically if a direct conflict exists between state and federal law. However, *Felder* compels state courts to run rules on the borderline between substance and procedure through the filters of both obstacle preemption and reverse-*Erie*, including a *Byrd*-like test that balances the state's "countervailing considerations" against the federal interests in protecting substantive rights and promoting uniform adjudication.

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65 *Felder*, 487 U.S. at 143.

66 *Id.*

67 *Johnson*, 520 U.S. at 913–14.

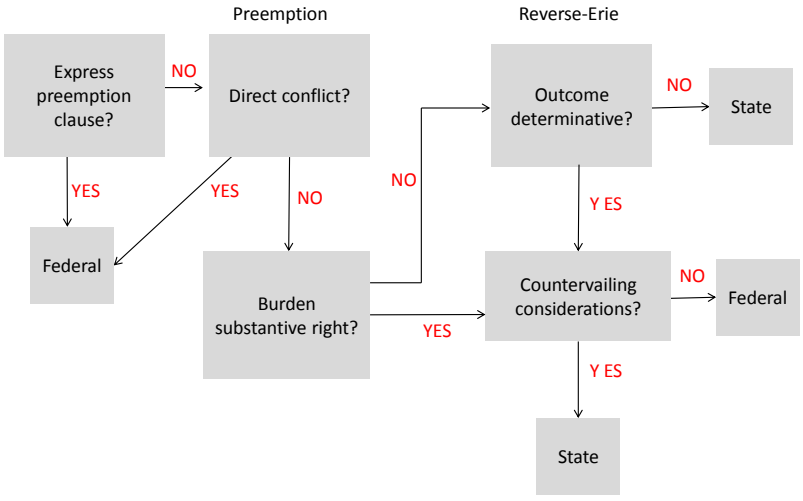
68 Over the plaintiffs' objections, the Court determined that there was not a strong federal interest in the substantive qualified immunity defense because, though rooted in § 1983, "the ultimate purpose of qualified immunity is to protect the State and its officials from overenforcement [sic] of federal rights." *Id.* at 919.

69 *Id.*

70 *Id.* at 918 n.9; *see* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 10.6 (1990) (stating that state procedural rules are generally insulated from preemption by the adequate state grounds doctrine in § 1983 claims unless those rules discriminate against the federal cause).

71 *Johnson*, 520 U.S. at 922–23.

FIGURE 2. Reverse-*Erie* Doctrine As-Is



II
REVERSE-*ERIE* IN PRACTICE

The asymmetry with the *Erie* doctrine becomes evident when reverse-*Erie* is put into practice. The first hurdle for the court is recognizing that a reverse-*Erie* issue exists. Misled by conflicts scholars or by the Supreme Court's wording in *Johnson* and *Felder*, the court may analyze the issue in terms of preemption, find no direct conflict, and give credence to the presumption in favor of state law. This error, however, occurs less often and is less intrusive to state sovereignty[72] than the second hurdle to faithful application of reverse-*Erie*: federal supremacy.

Most reverse-*Erie* cases come out in favor of federal law.[73] Why? Under *Erie*, in the absence of an on-point Federal Rule, the implicit presumption is in favor of federal procedural law. By comparison, under reverse-*Erie*, traditional notions of federalism mandate *against* a presumption of federal law. Given those assertions, one might

[72] Clermont, *supra* note 5, at 38 (stating that state courts end up applying federal law more than federal courts apply state law in the grey between substantive and procedural law).

[73] *Id.* at 38–42.

expect the majority of reverse-*Erie* cases to result in application of state procedural law. The opposite results cannot be explained away citing asymmetries between *Erie* and reverse-*Erie*. Instead, an unstated favoritism towards the federal sovereign indicates that the current reverse-*Erie* framework is a faulty one, which results in a presumption of federal law when the preemption doctrine plays too powerful a role.

A. Asymmetry Between the Doctrines

If one were to borrow from its *Erie* doctrine analog, a reasonable explanation for the lopsided results achieved under reverse-*Erie* would be to serve "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[74] In *Erie*, the Supreme Court announced:

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.[75]

By virtue of diversity jurisdiction, noncitizen plaintiffs and defendants alike have the opportunity to choose between the state and federal system—plaintiffs by filing a complaint in the desired court, and defendants by exercising their right to remove. Undoubtedly, these choices are motivated by whichever system featured law more favorable to the party's cause. A similarly situated party litigating in its home state, however, does not enjoy the same choice. A citizen plaintiff is virtually powerless to respond once their noncitizen opponent removed to federal court.[76] Likewise, citizen defendants are

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[74] Hanna v. Plumer, 380 U.S. 460, 468.

[75] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938) (citing Swift v. Tyson, 41 U.S. 1 (1842)).

[76] Once a defendant has successfully removed an action to federal court, a plaintiff seeking to remand the case back to state court faces the difficult and unlikely task of proving that the removal was procedurally defective. 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3739 (4th ed. 2012) (citing 28 U.S.C. § 1447(c)). Ostensibly, an in-state plaintiff could avoid such a fate if he joined an in-state defendant, thereby destroying diversity jurisdiction under 28 U.S.C. § 1332, or by requesting damages below § 1332's amount in controversy requirement. *See* Strawbridge v. Curtiss, 7 U.S. 267 (1806) (holding that complete diversity—diversity between each plaintiff and

subject to the plaintiff's choice of forum since removal is unavailable.[77]

A prototypical example of this discrimination appears in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[78] Facing an unfavorable state law, the plaintiff corporation dissolved its Kentucky headquarters and reincorporated in Tennessee to bring a diversity action.[79] Following *Swift*, a six-justice majority held that the district court properly applied "general" law rather than state precedent.[80] It was this kind of manipulation of the system that the *Erie* Court had in mind when it overturned *Swift*, opting instead for a system that would promote uniform adjudication of the same claim across both court systems.

However, the danger of "inequitable administration of the law" is lessened in reverse-*Erie*—not by application of federal law, but by the fundamental differences in subject-matter jurisdiction between state and federal courts. In a reverse-*Erie* situation, subject-matter jurisdiction is conferred upon state courts by virtue of concurrent jurisdiction,[81] leaving any plaintiff, regardless of their citizenship, free to bring their claim in either the federal or the state system. Defendants likewise have the choice to remove regardless of their citizenship, since federal jurisdiction would be founded on the "claim or right arising under the . . . laws of the United States."[82] Thus, *Erie*'s aim to correct a system that is more favorable to noncitizens than citizens is not as well-served by the application of federal law under reverse-*Erie* as by the application of state law under *Erie*.

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each defendant in an action—is required in § 1332 actions). *But see* 28 U.S.C. § 1447(e) (2006) ("If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder . . . ."). In any case, such choices are not always available to in-state plaintiffs, leaving them at the mercy of the defendant's choice of forum.

[77] In cases in which federal jurisdiction depends solely on diversity of citizenship of the parties, an action is not removable when the defendant is a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b) (2006).

[78] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

[79] *Id.* at 523–24.

[80] *Id.* at 529–31.

[81] While federal jurisdiction is conferred in *Erie* cases by diversity of citizenship, 28 U.S.C. § 1332 (2006), reverse-*Erie* cases arise where Congress has granted concurrent jurisdiction to state courts to entertain a particular federal cause of action, *see, e.g.*, Federal Employers' Liability Act, 45 U.S.C. § 56 (2006).

[82] 28 U.S.C. § 1441(a).

*B. Criticisms of Reverse-*Erie *As-Is*

In the absence of an alternative explanation, it is this author's humble opinion that a faulty framework is to blame for the irregular results achieved under the current reverse-*Erie* model. Of the four landmark cases relied upon to craft the current reverse-*Erie* framework, *Felder* is the most likely culprit. Without identifying a strong federal interest to justify either obstacle preemption or favoritism of federal law under a balancing test, *Felder* is the prime example of how federal supremacy can silently bleed into the choice-of-law methodology.

Despite the presumption against preemption and the absence of an actual conflict, the Court in *Felder* stretched its preemption analysis to displace state law. Finding that "Congress [could not have] intended federal courts to apply such rules, which 'significantly inhibit the ability to bring federal actions,'"[83] the Court pointed to no specific indicia of congressional intent.[84] Rather, the Court identified a conflict between the state's purpose in enacting the notice of claim statute—to minimize governmental liability—with the purposes behind § 1983's "uniquely federal" imposition of liability on governmental entities.[85] This superficial treatment of congressional intent appears pretextual in light of two considerations. First, assuming that the notice of claim statute functioned effectively to encourage pre-suit settlement,[86] what was it about the filing of the complaint that was so integral to § 1983? If a victim of a civil rights violation gets exactly the remedy he is seeking without ever setting foot in a courtroom, the full purposes and objectives of Congress cannot possibly be said to be frustrated. Second, it is difficult to believe that the notice of claim statute was inconsistent with federal interests[87] when the federal system itself requires prefiling notice of complaints.[88]

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[83] Felder v. Casey, 487 U.S. 131, 140 (1988) (quoting Brown v. United States, 239 F.2d 1498, 1507 (1984)).

[84] *See supra* notes 46–47 and accompanying text.

[85] *Felder*, 487 U.S. at 141.

[86] *See supra* note 61 and accompanying text.

[87] *See Felder*, 487 U.S. at 156–57 (O'Connor, J., dissenting) (stating that the notice-of-claim statute was not inconsistent with Congressional objectives, but instead was invalidated by the majority's "own intuitions about 'the goals of the federal civil rights laws'").

[88] Exec. Order No. 12988, 61 Fed. Reg. 4,729 (Feb. 5, 1996).

The Court's erroneous finding of preemption in *Felder* is made more confusing by subsequent findings that the notice-of-claim statute was outcome-determinative and that federal interests outweighed those of the state. *Felder* blurs the lines between preemption and reverse-*Erie*, but even in doing so, incorrectly performs the reverse-*Erie* tests. While it is difficult to imagine how a notice requirement would affect the ultimate disposition of the case,[89] it is also difficult to understand how the Court justified its balancing test. Articulating only one federal interest—uniform adjudication of § 1983 claims[90]—the Court nonetheless found that that interest alone outweighed those stated by the Wisconsin Supreme Court: "the [s]tate's legitimate interests in protecting against stale or fraudulent claims, facilitating prompt settlement of valid claims, and identifying and correcting inappropriate conduct by governmental employees and officials."[91] *Felder*'s treatment of the balancing test is both substantively and technically incorrect. First, common sense dictates that the state's interests in *Felder* are not so easily dismissed in comparison to the federal interest in uniformity. Second, for reverse-*Erie* to be a true mirror of *Erie*, the countervailing considerations to be balanced should be those of the state, not the federal government.[92]

The flaws of *Felder* signal not only that the current reverse-*Erie* framework is faulty, but also that the current framework allows for overapplication of federal law. Lower courts faithfully applying *Felder* would field state law first through the filter of preemption;[93] but where that test would normally lead to application of state law, courts are then compelled to test that law under traditional reverse-*Erie*,[94] thereby exposing the state rule to twice as many opportunities for displacement by federal law. This approach effectively invalidates the presumption against preemption. To honor this presumption, and states' rights generally, the framework must be reworked.

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89 A rule is only outcome-determinative if it would affect the ultimate disposition of the case. *See supra* note 62 and accompanying text.

90 *Felder*, 487 U.S. at 153, 156.

91 *Id.* at 137.

92 *Cf.* Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 538 (1958) (considering federal interests in the smooth operation of its courts as a counterpoint to *Erie*'s outcome-determinative test).

93 Janet M. Bowermaster, *Two (Federal) Wrongs Make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-In Class-Action Provision of the ADEA*, 25 U. MICH. J.L. REFORM 7, 20 (1991) (stating that characterization of a rule as substantive or procedural "has tended to come after, or even as a substitute for, striking a proper balance between federal and state interests").

94 *See supra* Figure 2.

*C. Reverse-*Erie *as It Should Be*

To truly put state interests on equal footing with their federal counterparts, federal law should be adjudicated in state court in much the same way that state claims proceed in federal court. To cure the defects in the current reverse-*Erie* framework, one need look no further than *Erie* itself. Flipping the *Erie* framework to produce its mirror image sheds some light on where the current reverse-*Erie* framework goes awry: as a parallel of *Erie*'s Rules Enabling Act route, preemption should come second, not first, in the overall methodology.[95]

Running rules through the filter of traditional reverse-*Erie* first ensures that borderline substantive-procedural rules receive the benefit of the presumption against preemption. When state courts are adjudicating federal claims, it is fairly obvious that federal substantive law controls. Conversely, rules that may be categorized as procedural deserve more careful consideration—this is so because non-outcome-determinative rules generally should not be preempted.[96] It can hardly be said that a rule that has no bearing on the ultimate disposition of the case[97] is in direct conflict with the federal claim. Under those circumstances, the presumption against preemption takes hold, to be rebutted only by the presence of a policy "of such particular federal importance that its effectuation would only be impeded by state regulatory involvement."[98] For rules that really regulate procedure, there is little likelihood that the federal government will have any particular interest in the way states operate their court systems.

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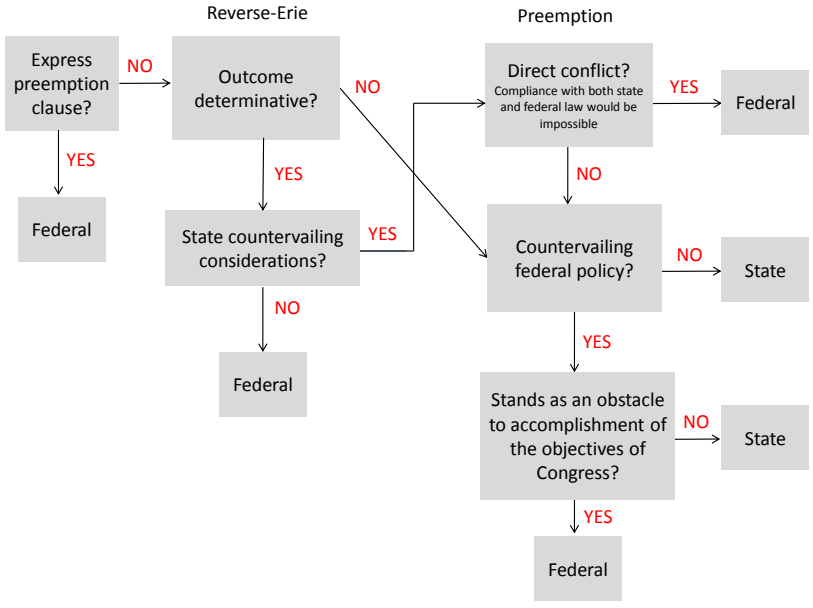
[95] *See infra* Figure 3.

[96] *See* Bowermaster, *supra* note 93, at 9–10.

[97] *See supra* note 62 and accompanying text.

[98] *See* Sharpe, *supra* note 50, at 176.

FIGURE 3. Reverse-*Erie* Doctrine as It Should Be



An illustration of *Felder* under the proposed framework shows the protections afforded to the states by this approach. In the absence of an express preemption clause, the Court would have begun by deciding whether the notice-of-claim statute was outcome-determinative. Had the court arrived at the correct answer under this step, it would have found strong countervailing considerations in the state's interest in minimizing liability,[99] as well as no direct conflict because the plaintiff could have easily complied with both the notice requirement and § 1983 simultaneously.[100] Even given the Court's erroneous finding that the notice of claim statute was outcome-determinative,[101] the Court would have struggled to articulate what critical federal policy the notice-of-claim statute was preventing from being executed. With so many barriers to displacing state law, the proposed framework likely would have prevented federal supremacy from overwhelming the analysis in *Felder*. Further illustration will also show that the proposed framework is the best way for correcting

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[99] Felder v. Casey, 487 U.S. 131, 143 (1988).

[100] *See supra* notes 86–88 and accompanying text.

[101] *See supra* note 63 and accompanying text.

the defects in most reverse-*Erie* cases, thereby providing some kind of reliable guidance for litigants going forward.

III
APPLICATIONS THROUGH INDIAN LAW

Indian law is a particularly interesting vehicle for analyzing adjudication of federal claims in state court. The judicial preference towards federal law is particularly evident in the context of Indian affairs, where the federal government is thought to have particular expertise and sensitivity. Broad federal authority over Indian affairs, derived from the Indian Commerce Clause[102] and the federal government's power to make treaties,[103] leaves little room for state regulation. In his 1832 *Worcester v. Georgia* opinion, Chief Justice Marshall decreed that Native American Indian tribes were wholly distinct nations within whose boundaries "the laws of [a state] can have no force."[104]

Given the disadvantages that Native Americans have historically faced in our justice system,[105] and in light of the additional safeguards put in place by the federal government for protection of those litigants, it is especially important that tribal members be able to predict their likelihood of success in court. To begin, the following section brings to light some special considerations in displacing state law when it comes to Native Americans. Next, through examination of several Indian law cases, this section illustrates the mistakes made by state courts under the current reverse-*Erie* framework. Applying the proposed framework to those cases, however, will demonstrate the benefits that can be achieved by application of a consistent framework that produces predictable results for all litigants.

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102 U.S. CONST. art. I, § 8, cl. 3.

103 U.S. CONST. art. II, § 2, cl. 2.

104 Worcester v. Georgia, 31 U.S. 515, 561 (1832).

105 *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 552 (1974) (stating that "the unique legal status of Indian tribes under federal law . . . . singles Indians out as a proper subject for [legislation] separate" from statutes forbidding discrimination on the basis of race); Deborah F. Buckman, Annotation, *Application of Voting Rights Act to* Native Americans, 40 A.L.R. FED. 2D 1 (2009) (discussing the inapplicability of anti-voting discrimination laws to Native Americans prior to 1975); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 775 (1997) ("Native Americans' efforts to vindicate their free exercise rights in federal court have generally been unsuccessful.").

A. Special Status of Tribal Nations Under Federal and State Law

Due to the sovereign history of tribal nations and their treaties with the United States, Native Americans enjoy special treatment under the law in several ways that might be relevant to the reverse-*Erie* analysis. Barriers to application of state law to Indian reservations and tribal members generally fall into two categories: the right to tribal self-government and federal preemption.[106] Either standing alone is a sufficient basis for holding state law inapplicable.[107] However, it should be noted that the two bases often overlap because the right of tribal self-government is ultimately authorized by Congress[108] and tribal sovereignty often serves as a "backdrop" for informing congressional intent behind vague or ambiguous federal enactments.[109]

First, the legislative history behind several statutes indicates a congressional intent to protect tribal self-governance from intrusions by the states.[110] Within tribal country, tribes are entitled to fashion and enforce their own law.[111] State law is generally inapplicable to on-reservation conduct involving only tribal members since the state's regulatory interest is minimal and the federal interest in encouraging tribal self-government is relatively strong.[112] Both on and off the reservation, the doctrine of sovereign immunity insulates tribes from liability. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* the Supreme Court noted that that while "Congress has always been at liberty to dispense with . . . or to limit" sovereign immunity, "Congress has consistently reiterated its approval of the immunity doctrine."[113] As such, states have minimal power to regulate the governance of Indian country.[114]

Additionally, because of the "unique historical origins of tribal sovereignty," the Supreme Court has applied a different standard of

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106 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

107 *Id.* at 143.

108 *Id.*

109 *Id.* at 144 (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973)).

110 *See, e.g.*, *McClanahan*, 411 U.S. at 176–77.

111 Nevada v. Hicks, 533 U.S. 353, 362, (2001) (citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 156 (1980)).

112 *See* Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480–481 (1976).

113 Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509–10 (1991).

114 *Hicks*, 533 U.S. at 362.

preemption to federal statutes regulating Indian tribes than it has to other federal laws.[115] Motivated by a policy to protect Indian tribes from incursions by the states, the Supreme Court has "rejected a narrow focus on congressional intent to pre-empt [sic] state law."[116] Instead, the Court engages in "particularized inquiry into the nature of the state, federal, and tribal interests at stake."[117] Courts determining the state's exercise of jurisdiction over Indian country must consider that "[s]tate jurisdiction is pre-empted [sic] by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[118] As part of the scheme to construe preemption broadly in Indian law cases, the Supreme Court announced in *Bryan v. Itasca County* that statutes passed for the benefit of Indians are to be construed in favor of Indians.[119]

*B. Reverse-*Erie *As It Should Be Through the Lens of Indian Law*

The two Indian law cases discussed below—coincidentally both from Oregon—illustrate the defects in the current reverse-*Erie* scheme and how unpredictable choices of law can be particularly devastating to Native American litigants. By way of background, Congress enacted the Indian Child Welfare Act (ICWA)[120] in 1978 to give tribes a strong voice in child custody proceedings when Indian children are involved.[121] The legislative history indicates a strong federal interest in keeping Indian children with their tribes and families,[122] as will become important in the following cases. Though it is usually state interests that are overlooked in reverse-*Erie*, the following cases exhibit situations in which federal and tribal interests

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115 *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

116 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

117 *Bracker*, 448 U.S. at 145.

118 *Mescalero*, 462 U.S. at 334.

119 Bryan v. Itasca Cnty., 426 U.S. 373, 392 (1976); *see also* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) (discussing statutory construction in light of the "Indian sovereignty doctrine").

120 25 U.S.C. §§ 1901–1963 (2006).

121 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 38 n.12 (1989) (citing 25 U.S.C. § 1914 (1988)).

122 "One of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families." House Report, at 12, U.S. Code Cong. & Admin. News 1978, at 7534.

are ignored. Nevertheless, the proposed framework is helpful for reconciling a variety of defects, including where: (1) the court looks only to preemption, and finding weak federal interests in procedural rules, applies state law; and (2) failing to recognize any conflict between the state and federal interests, the court applies the law of the forum.

1. Procedural Rules Not Preempted

Under one scenario, premature preemption analysis leads to an erroneous finding that a seemingly procedural state rule is not preempted. In *State ex rel. Juvenile Department v. England*, the Court found that in defining "legal custody," the state's plain meaning rule was not preempted.[123] Under the ICWA, an "Indian custodian," defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under [s]tate law or to whom temporary physical care, custody, and control has been transferred by the parent of such child,"[124] is entitled to notice of hearings to terminate foster care.[125] Under Oregon's plain meaning rule, petitioner was not entitled to notice because she had not been granted "legal custody" under Oregon state law.[126] Conversely, under the federal canon construing "statutes passed for the benefit of Indians . . . in favor of Indians,"[127] petitioner, the aunt of an Indian child to whom care had been transferred by the state,[128] may have been entitled to notice. The Oregon Supreme Court held that the state's plain meaning rule was not preempted because, on the face of the statute itself, Congress had left determination of "legal custody" up to state law and thus preemption was not clearly intended by Congress.[129]

Contrary to the majority's reasoning, proper application of reverse-*Erie* would seem to suggest that the statutory construction rule was both substantive and subject to preemption. Aside from the Oregon Supreme Court's circular reasoning regarding preemption—that the

123 State ex rel. Juvenile Dep't v. England, 640 P.2d 608, 613 (1982).

124 25 U.S.C. § 1903(6) (2006).

125 25 U.S.C. § 1912 (2006).

126 *England*, 640 P.2d at 612–13.

127 *Id.* at 615 (Tongue, J., dissent) (quoting Bryan v. Itasca Cnty., 426 U.S. 373, 392 (1976)).

128 *Id.* at 609.

129 *Id.* at 613. *But see Holyfield*, 490 U.S. at 44 ("[T]he purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term . . . .").

plain meaning of the statute dictates that the plain meaning rule is not preempted—imposition of the proposed framework on *England* reflects that application of federal, not state statutory construction, was more desirable in this case. In the absence of consensus on whether statutory construction amounts to substance or procedure,[130] the Oregon Supreme Court in *England* would have been well advised to begin their analysis with reverse-*Erie*. It seems clear that in this circumstance, the choice of statutory methodologies would have indeed affected the ultimate disposition of petitioner's case; thus, the rule was outcome-determinative. Moving on to the balancing test, the court failed to articulate a state interest at play behind its plain meaning rule—to the contrary, the court articulated a federal interest in protecting transfers to extended family members.[131] Traveling down the reverse-*Erie* route alone seems to point obviously to application of federal law, but even a detour into obstacle preemption supports the same result. As Justice Tongue stated in his dissent, the plain meaning rule and its effects conflict with the remedial nature of ICWA and Congressional objectives to protect Indian children from being separated from their families and tribal members.[132] Especially considering the relaxed standards for preemption in the Indian law context,[133] the Oregon Supreme Court erred by finding that the state rule was not preempted.

2. Rules of the Forum Applied Where Conflict Unrecognized

In a second scenario, a failure to recognize a choice-of-law issue results in indiscriminate application of state rules. In *Quinn v. Walters*, failure to recognize a reverse-*Erie* or preemption issue led to the application of state rules of evidence to an ICWA claim.[134] In *Quinn*, a birth mother moved to dismiss an adoption proceeding under the ICWA after signing an irrevocable consent to adoption under Oregon law.[135] The birth mother was not a member of the Cherokee Indian Tribe at the time of the child's birth and signed an affidavit

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130 *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) (arguing that courts' failure to recognize statutory construction as "law" exempts interpretation methodologies that ought to be considered under *Erie* and reverse-*Erie* from the substantive-procedural inquiry).

131 *England*, 640 P.2d at 612; *see also id.* at 616 (Tongue, J., dissenting).

132 *Id.* at 616–17.

133 *See supra* notes 115–19 and accompanying text.

134 Quinn v. Walters, 881 P.2d 795 (1994).

135 *Id.* at 797–98.

stating as such,[136] but later presented a letter from the tribe's registrar that she had enrolled in the tribe and that her child was also eligible for membership.[137] The case then hinged on whether the child was an "Indian child" entitled to the protections under ICWA.[138] Without identifying a choice-of-law issue, the Oregon Supreme Court employed Oregon's evidentiary rules and statutory construction method and found that the registrar's record was inadmissible hearsay and that there was otherwise insufficient evidence to find that the child qualified as an "Indian child."[139]

In an insightful dissent, Justice Unis argued that the majority had allowed a "hypertechnical procedural ruling [to defeat] substantive rights recognized by Congress belonging to a birth mother, a child, and an Indian tribe."[140] Justice Unis proposed that application of "the rules of evidence to this case as if it were a typical adversary proceeding . . . reaches a result that is contrary to the purpose and spirit of the ICWA,"[141] unduly restricted the litigant's opportunity to assert her federal claim, and therefore should have been displaced by the federal standard of making a pretrial inquiry into the child's Indian status.[142] Throughout both choice-of-law analyses, Justice Unis referred to the tribal and congressional interests in uniform adjudication of ICWA.[143] Ultimately, the dissent found that federal and tribal interests in "'having [Indian] children remain with or become a part of the tribe'" outweighed the state's interest in defining its own rules of evidence.[144]

Imposition of the proposed framework on *Quinn v. Walters* reveals reasoning and results strikingly similar to Justice Unis's dissent. Beginning with reverse-*Erie*, the application of state hearsay rules was indeed outcome-determinative, but most likely implicated the same countervailing considerations (administration of the sovereign's courts) articulated in the landmark case of *Byrd*.[145] Under the proposed framework, rules—like the state evidence rules at issue in

136 *Id.* at 798.
137 *Id.*
138 *Id.* at 799.
139 *Id.* at 799–800.
140 *Id.* at 805 (Unis, J., dissenting).
141 *Id.* at 809.
142 *Id.* at 812.
143 *Id.* at 806.
144 *Id.* at 809 (quoting H.R. Rep. No. 95-1386, at 23–24 (1978)).
145 *See supra* text accompanying note 27.

Quinn—that are adjudged to be procedural under the reverse-Erie route are unlikely to be displaced in favor of federal law. Nevertheless, the presence of an important federal policy can rebut the presumption against preemption. Here, that critical federal interest, properly considered in reference to tribal self-governance[146] and the tripartite *Bracker* test,[147] was identified by Justice Unis as the interest in keeping Indian children with their tribes. Where application of the state rule frustrates that critical interest, as it did here, state rules must fall in favor of federal procedure.

CONCLUSION

While reverse-*Erie* has proven to be a more intrusive doctrine than its more well-known counterpart, its basic similarities to *Erie* have provided both the solution to that doctrine's most troublesome defects and some comfort regarding the lack of education law students and practitioners receive on the merits of this doctrine.[148] Though the Supreme Court has supplied a framework for deciding the applicability of federal law in state court, that framework is a faulty—and perhaps unnecessary—one. All we must know is that, whatever the conflict, the test boils down to a balancing test. Where rules that "really regulate procedure" are at issue, a presumption in favor of the forum's rule is created, which can then be rebutted by strong countervailing policies. By perpetuating these universal principles, courts may create the necessary certainty in litigation to encourage access to justice for even those litigants who are most disadvantaged.

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146 *See supra* notes 110, 112 and accompanying text.

147 Considerations of preemption should account for the interests of the state, the federal government, and the tribe. *See supra* note 117 and accompanying text.

148 *See supra* note 7 and accompanying text.