Reverse-Erie

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INTRODUCTION

Traditional Erie\(^1\) is like a false front on a movie set, with few seeing the unfinished rear side. That other side represents the extent of federal law applicable in state courts, which the legal system determines under a doctrine called reverse-Erie\(^2\) (or occasionally by academics “converse-Erie”\(^3\) or “inverse-Erie”\(^4\)). While everyone has an Erie theory and stands ready to debate it, almost no one has a theory of reverse-Erie, and no one at all has developed a clear choice-of-law methodology for it: reverse-Erie, often misunderstood, mischaracterized, and misapplied by judges and commentators, goes strangely ignored by most scholars.\(^5\)

1 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
2 The term seems to have first appeared in commentary and case law through off-handed usages by William F. Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1, 34 (1963), and American Universal Insurance Co. v. Chauvin, 329 F.2d 174, 179 (5th Cir. 1964) (“Nothing we here do or say is intended as even a gentle reverse-Erie breeze to the contrary.”); cf. infra note 104 (earlier similar usage).
5 Remarkably little has been written on the doctrine (and, as one of my students pointed out tactfully, Googling “reverse-Erie” reveals little of significance besides this Article). The earliest article on the subject is the prescient one by Alfred Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 OHIO ST. L.J. 384 (1956). Professor Hill detected and generalized the emergent doctrine, link-

\textsuperscript{6} “It is impossible to overstate the importance of the \textit{Erie} decision.” \textsc{Charles Alan Wright & Mary Kay Kane, Law of Federal Courts} § 55, at 378 (6th ed. 2002). While that quotation must be an overstatement in itself, cf. Kevin M. Clermont, \textit{Foreword to Kuo-Chang Huang, Introducing Discovery into Civil Law}, at ix, xviii n.50 (2003) (discussing other kinds of self-contradictory statements), it is not far off from representativeness or from accuracy.

\textsuperscript{7} The \textit{Erie} situation involves a “choice of law” in the sense that the federal authority is deciding whether federal law should be generated to apply to a given issue or state law should be left to govern. The decision on this “vertical” choice of law is often reached by a process similar to that employed in the more traditional “horizontal” choice of law. \textit{See Joseph P. Bauer, The \textit{Erie} Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis}, 74 \textit{Notre Dame L. Rev.} 1235, 1255–63 (1999); Martin H. Redish, \textit{Continuing the \textit{Erie} Debate: A Response to Westin and Lehman}, 78 \textit{Mich. L. Rev.} 959, 960–62 (1980). Indeed, some have found in traditional conflict-of-laws doctrine the answer both to reverse-Erie, \textit{e.g.}, Weinberg, \textit{supra} note 5, at 1753–54 (arguing that the Supremacy Clause calls for federal law to prevail in all cases of so-called actual conflicts), and to preemption, \textit{e.g.}, Mary J. Davis, \textit{On Preemption, Congressional Intent, and Conflict of Laws}, 66 \textit{U. Pitt. L. Rev.} 181, 230–31 (2004) (suggesting a more nuanced use of comparative impairment analysis).
lem of the appropriate relationship between state and federal law throughout the legal system. For some judges and commentators, "Erie" connotes only the courts' choice-of-law methodology, but for others, and for this Article, the name connotes as well these broader topics of state and federal laws' interplay. That is, judicial choice of law is just one corner of the whole, even if it is the corner that has generated the greatest interest and provided the greatest explanatory force. Its classic cases—difficult cases in diversity that primarily concerned the law governing quasi-procedural issues on which the Constitution and Congress were silent—are uniquely informing as to the megadoctrine on the governing law in a system of federalism.

Reverse-Erie occupies the opposite side of the federalism coin from that occupied by the classic Erie cases. In state court, when does state law apply and when does federal law apply? By this formulation, reverse-Erie poses a question that is very similar to the Erie question—although tantalizingly, it does not have an identical answer, as we shall see. It also seems to pose a question at least as important as Erie—and in fact numerically far more significant because, as everybody knows, the volume of business in state courts dwarfs that in federal courts, and federal law covers a wide array of litigation-producing activities that end up in state court. Consequently, the denigrated or ignored reverse-Erie doctrine appears to be, on its own, both a potentially instructive and an undeniably important feature of the fundamental relationship of state and federal law.

This Article contends that reverse-Erie does indeed hold the key to understanding the major problem ubiquitously encountered in our system: the choice between state and federal law. This Article will eventually build to the contention that every actor, public or private, who faces a legal question in a federal system must first resolve this question of vertical choice of law. Therefore, at the least, one cannot fully understand the overall relationship of state and federal law if the reverse-Erie piece of the puzzle is missing (to be mercilessly unfaithful to metaphor). Arguably, one cannot truly understand even the Erie side alone if one ignores the reverse-Erie doctrine.

This Article accordingly tries, in Part I, to unearth the reverse-Erie doctrine by developing a theory and methodology. Then it will more

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8 See, e.g., Harper v. Vigilant Ins. Co., 433 F.3d 521, 525 (7th Cir. 2005) (applying Erie choice-of-law analysis in a diversity action); Bauer, supra note 7, at 1236 (analogizing Erie to traditional choice of law).

9 See, e.g., Bellia, supra note 5, at 901–09.

10 See, e.g., Bauer, supra note 7, at 1243–63 (describing the process by which courts applying Erie identify and resolve conflicts between state and federal law).
briefly try, in Part II, to explain the overlooked significance of this subject.

I. Doctrine

By reverse-Erie, federal law flows down to govern in state court.\(^{11}\) Under currently expressed views of the doctrine, however, it does so by uncertain means and to an uncertain extent.\(^{12}\)

To get more of a handle on reverse-Erie as a matter of judicial choice of law, analysts most often start from preemption.\(^ {13}\) They do so because it is the most closely related doctrine in the task of determining the reach of federal law.\(^ {14}\) It is in some senses the more important doctrine, with big consequences in both federal and state litigation as well as out in the real world.

Preemption, in brief, is an ill-bounded constitutional doctrine that invalidates state law if it interferes with federal law.\(^ {15}\) Although preemption tends to focus on displacement of state substantive law by

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12 See, e.g., David W. Robertson, Admiralty and Maritime Litigation in State Court, 55 LA. L. Rev. 685, 700 (1995) (noting the inconsistency in Supreme Court pronouncements on the question of whether state courts must apply federal or state law in maritime cases).
13 E.g., Erwin Chemerinsky, Federal Jurisdiction § 3.5 (4th ed. 2003); Weinberg, supra note 5, at 1785–86. But cf. infra note 207 (noting other doctrines that federal courts scholars use as points of departure for approaching reverse-Erie).
14 Preemption in turn bumps up against the constitutional doctrines of "federalism" that limit federal powers to certain spheres or that invoke the Tenth Amendment to prohibit exercise of those federal powers in certain ways impinging on the states' sovereignty. See Charles Fried, Saying What the Law Is 13–48 (2004). Compare David B. Spence & Paula Murray, The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis, 87 CAL. L. Rev. 1125, 1129 (1999) ("For most judges, whether liberal or conservative, these cases pit one dimension of their ideology, their principles of federalism, against another, their policy preferences or attitudes toward the particular local regulation at issue."). and Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1, 130–34 (2004) (arguing to resolve the tension between preemption and federalism in favor of state autonomy by limiting preemption), with Allison H. Eid, Preemption and the Federalism Five, 37 Rutgers L.J. 1, 26–28 (2005) (reconciling the tension between preemption and federalism principles).
15 See Erwin Chemerinsky, Constitutional Law § 5.2 (3d ed. 2006); Christopher R. Drahozal, The Supremacy Clause 89–125 (Jack Stark ed., 2004). A similar analysis applies in determining when a federal statute, such as a securities act, repeals a prior federal statute, such as an antitrust act. See, e.g., Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 146–47 (2d Cir. 2005); cf. Bernadette Bollas Genetin, The Powers That Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule, 57 Baylor L.
congressional statute, judges and commentators recognize that it can
displace state procedural law too, and that it can occur by federal
administrative act or even by the effect of federal common law.
Preemption can be express or implied; and implied preemption can
trump a state provision that conflicts by discrimination against or con-
tradiction to federal law or stands as an obstacle to federal law,
can authorize federal law to occupy exclusively a whole field, although of course all these categories are blurry.

rules that incorporate state law and statutes).
Anthony J. Bellia Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947,
18 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964); Local 174,
Teamsters v. Lucas Flour Co., 369 U.S. 95, 102–04 (1962); WRIGHT & KANE, supra note
6, § 45, at 294; Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99
Harv. L. Rev. 881, 897 (1986); Thomas W. Merrill, The Common Law Powers of Federal
19 See Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996); Cipollone v. Liggett
Law by Federal Law: A Task for Congress or the Courts?, 40 Vill. L. Rev. 1, 2–4, 88–90
(1995) (arguing that express statutory provisions are not wise and that courts should
play the more active role in preemption analysis), with Bradford R. Clark, Separation of
preemption should follow only from a clearly preemptive statute).
dicta that state law would be preempted if laws “impose directly conflicting duties on
national banks—as they would, for example, if the federal law said, ‘you must sell
insurance,’ while the state law said, ‘you may not’”); Fla. Lime & Avocado Growers,
Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (saying that state law would be preempted
“where compliance with both federal and state regulations is a physical
impossibility”).
21 See Barnett Bank, 517 U.S. at 31 (saying that state law would be preempted
where “the Federal Statute authorizes national banks to engage in activities that the
State Statute expressly forbids”); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (saying
that state law would be preempted where it “stands as an obstacle to the accomplish-
ment and execution of the full purposes and objectives of Congress”).
U.S. 190, 212–13 (1983) (saying that state law would be preempted when “the Federal
Government completely occupies a given field or an identifiable portion of it”); Rice
may be so pervasive as to make reasonable the inference that Congress left no
room for the States to supplement it. Or the Act of Congress may touch a field in
which the federal interest is so dominant that the federal system will be assumed to
preclude enforcement of state laws on the same subject.” (citations omitted)).
In exploring preemption, as one gets into implied preemption by conflict and turns toward possible preemption of state procedural law otherwise applicable in state court, one encounters the classic reverse-Erie cases, which books often treat as sui generis under some heading like “State Court Procedures and Federal Law Claims.” As one pushes further into judicial decisions that on their own federalize some point of law for state courts, without any semblance of a search for actual congressional intent, one starts to see the wider application of reverse-Erie. Then, when one perceives complementary methodologies at work in these two realms of implied preemption and judicial choice of law, one should start to sense the significance of reverse-Erie.

Nevertheless, many commentators end up considering reverse-Erie to amount to nothing more than preemption. Their view has wide consequences. Because preemption most often involves only displacement of state substantive law by interpretation of congressional legislation, these commentators tend to think predominantly in those terms. Moreover, quotes abound in the case law about preemption.

24 Drahozal, supra note 15, at 84.
26 E.g., Weinberg, supra note 5, at 1785–86; see, e.g., Chemerinsky, supra note 13, § 3.5.
27 See, e.g., Drahozal, supra note 15, at 90; Davis, supra note 7, at 198–200; Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 226 (2000) [hereinafter Nelson, Preemption]. For an example of the flawed consequences of this approach, Professor Nelson centrally argues that, under his view, federal law can implicitly preempt no more than state law that logically contradicts the federal law, and not state law that merely frustrates the federal law, id. at 260–64; accordingly, he concludes that, in the absence of an explicitly preemptive statute, the current doctrine of obstacle preemption by judicial construction lies beyond the proper reach of the Supremacy Clause and preemption. Id. at 265–90. His position, however, could make sense only in a legal system with no judicial lawmaking. Imagine a point of law that obstacle preemption would currently federalize but that he would leave to state law in state court. When that point arises in a federal action, an Erie analysis would almost always lead to creation of federal common law, because here the implied-preemption and federal-common-law doctrines overlap and because the latter would encounter no limitation comparable to his restriction on obstacle preemption. Once that federal common law definitely exists, it would henceforth displace the state law in state court, because the state law now squarely contradicts the federal common law. See supra text accompanying note 18. Indeed, reverse-Erie would have obligated the state courts to anticipate the existence of federal common law, and so displaced state law from the start. See infra text accompanying note 144. Therefore, obstacle preemption would reappear through the back door, leaving little or no reason to barricade the front door. Compare Clark, supra note 19, at 1452–57 (necessarily coupling a view that would severely restrict federal common law to a somewhat similar attack on obstacle preemption), with Ca-
being narrowly limited, and often viewed on a background of a presumption against preemption. Thus, broad thoughts about reverse-
Erie languish.

Other commentators, some of whom sense something in reverse-
Erie that goes beyond preemption, study it when focusing on the procedure to govern in a particular substantive context and sometimes with a substantive result already in mind. They tend to create exotic doctrine for special occasions when federal procedure should trump state procedure during state court litigation of federal-law issues.

Reverse-Erie in fact is more than the view of any of these commentators, and indeed more than a combination of their views. The fact is that many cases, such as those involving state court procedures and federal-law claims, apply federal law in state court in circumstances that preemption does not reach. What is the applicable doctrine that produces this result? To get at its actual content and possible significance, renewing analysis from the beginning is necessary. Accordingly, I propose to launch into the overall relationship of state and federal law applicable in state court. This broad reconception of reverse-Erie thus subsumes both preemption and judicial choice of law, while each informs the other. After so generalizing the subject,


29 E.g., Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 HARV. L. REV. 1128, 1132 (1986) (studying inadequate state ground and federal habeas corpus doctrines “to establish a broad and flexible federal doctrine excusing procedural defaults by state court litigants raising federal issues,” and explaining that this common law doctrine would apply in both state and federal courts); Neuborne, supra note 5, at 787 (seeking “to establish a uniform and hospitable body of collateral rules governing constitutional litigation in both state and federal court in order to facilitate civil rights enforcement).

30 See, e.g., Meltzer, supra note 29, at 1190 (discussing the application of federal standards “to determine the appropriateness of a state court forfeiture of a federal claim in a criminal case”).

31 See, e.g., DRAHOZAL, supra note 15, at 84–86 (discussing case law).

32 See Viet D. Dinh, Reassessing the Law of Preemption, 88 GEO. L.J. 2085, 2097–2112 (2000). This fine article argues against the existence of any general presumption against preemption, id. at 2092–97, and then describes a spectrum running from express preemption through conflict, obstacle, and field preemption to federal common law and dormant Commerce Clause analysis so that the law of preemption should not be analyzed as conceptually discrete and distinctive doctrines, but rather can be properly assessed only as part of a spectrum of interrelated mechanisms whereby federal law displaces state law.
I shall divide it up by using the familiar and largely unquestionable framework of the differing institutional competencies of the Framers, Congress, and courts. Such an analysis will make doctrinal labels such as preemption and judicial choice of law fade into the background.

However, before so generalizing and subdividing vertical choice of law in state court, the subject of the law applicable in federal court deserves a few words. This brief detour into *Erie* will set the stage by stating the institutional competencies that frame the general problem, while going into detail only where relevant to the subsequent discussion of reverse-*Erie*. It will also make the critical point that agreement between reader and author on a particular methodology for resolving specific *Erie* questions is not a prerequisite for following or even accepting this Article’s discussion of reverse-*Erie*.

**A. Law Applicable in Federal Court**

As already suggested, preemption is a major doctrine that helps in determining the reach of federal law for actions litigated in federal court. But the preemption doctrine coexists with a ballyhooed choice-of-law doctrine. The details of this coexistence have stimulated little attention among scholars. Instead, they fixate in casebook and commentary on the part of *Erie* that concerns judicial choice of law.\(^3\)

To understand as a whole the big picture of federalism, one must first reconsider the institutional structure, including the constitutional and congressional powers to limit judicial choice of law.\(^4\) The federal government may make the choice between state and federal law by its ordinary hierarchy of lawmakers: the Federal Constitution, Congress (or its authorized administrative delegate), or the federal courts. If the Constitution or Congress expressly or impliedly made the choice

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\(^3\) The spectrum includes not only the core statutory preemption doctrines but also mechanisms whereby state law is displaced even without any relevant congressional action.

\(^4\) See, e.g., *Wright & Kane*, supra note 6, § 55 (presenting an excellent *Erie* discussion mainly focused on judicial choice between federal and state law).

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\(^3\) See generally *Kevin M. Clermont*, **Principles of Civil Procedure** § 3.2(A), (C) (2005) (providing additional citations for the following abbreviated *Erie* summary).
of law, that choice is binding on the federal courts. Only in the absence of such a constitutional or congressional directive must the federal courts decide whether state or federal law applies. In fact, then, this latter situation involving judicial choice of law in federal actions represents a small part of the big picture, which I shall now sketch.

1. First, Mostly Considering Separation of Powers

In addition to authorizing the making of much supreme federal law, the Constitution could itself have dictated many choices that federal law govern particular points in federal court, and of course these choices would be binding. An example is the Seventh Amendment’s guarantee of trial by jury: the constitutional jury right directly governs in all federal court cases, although not in state court cases. Most often, however, the Constitution did not so dictate that federal law apply.

Where the Constitution did not choose federal law, the Constitution might have instead prohibited the federal authorities from choosing to apply too much federal law. That is, the Constitution could choose state law, as it generally did in establishing the limited federal government.

In many circumstances, however, the Constitution did not choose, leaving Congress able to make a valid choice by statute in favor of federal law or state law. That is, within the just-described constitutional limits lying at the two extremes, Congress can expressly or impliedly make the choice of law between federal and state law for actions litigated in federal court, and its choice will bind the federal courts. If Congress chooses the applicable law, the only vertical choice-of-law question remaining for the courts is whether that choice was constitu-

35 Id. § 3.2(A), at 199.
36 Id.
37 Id.
38 Id.
39 See CHEMERINSKY, supra note 15, § 3.1, at 234 (explaining the doctrine of limited federal legislative authority).
40 Compare, e.g., FED. R. EVID. 302 (legislating that state law governs some presumptions in federal court), with, e.g., FED. R. EVID. 407 (legislating that federal law governs admissibility in federal court of subsequent remedial measures). The Evidence Rules, which were actually a federal statute, provide a nice source for comparable examples throughout this section.
tionally valid, because the Constitution imposes the only bounds on the congressional power.\textsuperscript{41}

If Congress chooses federal law, and hence to preempt state law, it usually specifies the \textit{content of that federal law};\textsuperscript{42} although it sometimes delegates to the federal courts the task of generating part or all of that federal law.\textsuperscript{43} It is important to keep clear this distinction between choosing the applicable law and specifying its content.

Here, finally, is the main point: only in the absence of both a constitutional and a congressional directive can the federal courts validly choose to apply federal or state law. As already observed, this court-drawn boundary is what many people narrowly term to be the \textit{Erie} question.\textsuperscript{44}

All the institutional actors are of interest here. But maximal exposure of the choice process, in its systematic and rational form, comes when we examine how federal courts choose between state and federal law, for application to a particular issue in a case, in those circumstances where the federal courts are free under the Constitution and federal legislation to go either way. Judicial choice, therefore, does merit the special attention it receives. So, when neither the Constitution nor Congress has determined the law applicable to a new situation—when neither has spoken on choice of law, and also when the federal courts have not formerly settled the question—how can and should a federal court exercise its residual choice-of-law power?

\section*{2. Next, Mostly Considering Federalism}

The federal court is not determining whether pre-existing federal law \textit{already} covers the question, because if the law did, the court would not be dealing with a situation of silence by the lawmakers above the court in the lawmaking hierarchy. Instead, the court must look at federalism policies somehow to decide if federal law \textit{should} govern. If so, and because that federal law does not already exist, the court then must create the federal law, most often by analogy or adoption. That is, once the court chooses federal law, it must extend federal law by creating specialized federal common law, which thereafter exists and applies by stare decisis.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{42} \textit{E.g.}, Fed. R. Evid. 601 (competency).
\item \textsuperscript{43} \textit{E.g.}, Fed. R. Evid. 501 (privilege).
\item \textsuperscript{44} See supra note 8 and accompanying text.
\item \textsuperscript{45} For a synopsis of the \textit{Erie} doctrine's application to federal common law, see Wright & Kane, \textit{supra} note 6, § 60.
\end{itemize}
It is useful to recognize that the courts' choice-of-law power therefore equates to a lawmaking power. The outer boundary on the federal courts' power to choose on their own to apply federal law is equivalent to a judicial lawmaking power because, whenever the federal courts so choose to apply federal law, they are extending, and hence making, federal law.\textsuperscript{46}

Incidentally, Congress's powers to choose and make federal law likewise equate.\textsuperscript{47} The same constitutional limit applies to both congressional powers.\textsuperscript{48}

Accordingly, the federal legislature and also (when that legislature is silent) the federal courts can choose and make federal law, subject to their respective constitutional limit. Those limits, rooted in federalism, permit significant lawmaking activity by the federal government. Yet limits must have some teeth, however stubby. Because the \textit{Erie} Court treated the limit on judicial power, but not the limit on congressional power,\textsuperscript{49} the relation between the two limits remains unstated authoritatively. Nonetheless, it would seem that the boundary demarcating constitutionally permissible matters for the federal courts to reach with federal common law is more restrictive than the boundary applicable to federal legislators.\textsuperscript{50} The lawmaking function of Congress to create federal law for application in federal court is thus more expansive, permitting greater intrusion into matters of state interest. Congress may validly opt for federal law more often than the federal courts can, because under our constitutional structure Congress should be the more active articulator of federal interests, while the courts must steer clear of blatantly formulating policies.

We need not pin down precisely those constitutional limits. In federal court today, state law will apply in many situations where such application is not constitutionally compelled—that is, where the federal authorities could make federal law—because the federal government defers to state law by declining as a matter of comity to exercise the full extent of its constitutional powers.\textsuperscript{51} Congress and the federal courts could resolve any doubts in the hard cases under current doc-

\textsuperscript{46} \textit{See} id. § 60, at 414–15.
\textsuperscript{47} Taking into account the peculiarities of treaty-making would require greater verbal precision, but would end similarly. \textit{See} Missouri v. Holland, 252 U.S. 416, 434–35 (1920).
\textsuperscript{49} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 79–80 (1938).
\textsuperscript{51} \textit{Clermont}, supra note 34, § 3.2, at 143.
trine either way—in favor of the federal law or, for that matter, in favor of the state law—without substantial fear of unconstitutional usurpation or derogation of state or federal powers. They truly are choosing. In this sense, the Constitution does not enter into solving the usual choice-of-law problem under the *Erie* doctrine. Congress and the federal courts are largely free, as far as constitutional powers go, to rationalize and rework the *Erie* doctrine.

In making its free choice, any federal actor obviously should exercise its powers to choose between state and federal law in a way that optimizes our system of federalism, even if optimality will inevitably appear according to that actor's lights. Thus, when it legislates a choice between state and federal law, Congress would ideally use a methodology similar to the federal courts' *Erie* approach, although of course Congress may be less systematic and rational in practice than the courts. So, again, how do the courts choose?

3. Finally, Specifying a Judicial Choice-of-Law Methodology

Since the beginning, the Supreme Court, with the lower federal courts in tow, has progressed through a sequence of choice-of-law techniques for judicially handling the *Erie* problem as a matter of comity. Today, federal law prevails if a Federal Rule covers the matter, according to *Hanna v. Plumer*. But for the rest of law, the Court has not yet arrived at any truly clear or optimal solution.

Indeed, the variety of views is staggering—on this step in the description of *Erie*, which is the step of judicial methodology, as opposed to the foregoing description of institutional competencies. Some time ago I went to a talk on *Erie* and came away shocked. The shock was that I basically agreed with the speaker. Over the years I have heard and read so much about *Erie*, but so little with which I agreed. I do not think my disagreements reflected my being out-of-step, as virtually none of the speakers and writers agreed with each other. It has always struck me as exceedingly odd that intelligent and reasonable people could read such a small group of cases so wildly differently. But that is an empirical fact: disagreement is rampant on judicial choice-of-law methodology.

52 Id. § 3.2, at 144.
54 See Bauer, supra note 7, at 1255–63 (describing four methodologies used by courts in choosing between a state law and conflicting federal common law); supra notes 6–10 and accompanying text.
Anyway, for its illustrative worth, my view is that the courts do evaluate (1) the state's interests, in light of all legitimate purposes or policies reflected by the content of its law, in having its legal rule applied in federal court on this particular issue, in order to see if they equal or outweigh the net sum of (2) the federal interests in having federal law govern, which are called affirmative countervailing considerations, and (3) the negative federal interest in avoiding the forum-shopping and inequality effects of any outcome-determinative difference between state and federal law. This balance thus calls for application of the law of the sovereign whose functions would be more impaired by nonapplication.

Balancing here means the contextualized exercise of judgment in the face of competing interests.\textsuperscript{55} Admittedly, there can be an emptiness in principles that call for balancing, such as a principle saying that the distribution of powers to federal and state governments must be kept in balance.\textsuperscript{56} But balancing can be an intelligible standard of decision that avoids ad hocism, as long as it contains comprehensible content for conceptualizing and resolving conflicts. The \textit{Erie} balance is not an empty metaphor and is instead an intelligible standard for choice of law, even if malleable in application, because it provides a "specification" of interests to put on the scales for weighing and then prescribes a "criterion" in terms of the resulting position of the scales for reaching an outcome.\textsuperscript{57}

Although today's \textit{Erie} balance proceeds specific issue by specific issue in any one case, this feature did not always appear inevitable. The case law until recently seemed to have used balancing instead to create a series of fairly general rules that soundly made the choice between state and federal law for all the common subjects, and then woodenly applied these general rules that allocated one subject to federal law and another subject to state law and so on. For two examples, federal law governed if a Federal Rule was on point,\textsuperscript{58} while state law

\textsuperscript{55} See Jackson, supra note 5, at 136–40.

\textsuperscript{56} See Robert Justin Lipkin, \textit{Federalism as Balance}, 79 TUL. L. REV. 93, 109 (2004) ("This Article shows that conceptualizing 'federalism as balance' relies on only an unanalyzed, unexplicated, intuitive sense of balance totally devoid of even minimal precision and lucidity for the purposes of describing, explaining, and justifying federalism.").

\textsuperscript{57} See id. at 103–05, 124, 164.

\textsuperscript{58} \textit{Hanna}, 380 U.S. at 471. To give a flavor of the debates here, on a point that will become relevant later in this Article, I would maintain that in \textit{Hanna} it was judicial choice of law, rather than implied congressional command, that decided the case—despite the fact that Professor Ely's revered article argued to the contrary. See John Hart Ely, \textit{The Irrepressible Myth of Erie}, 87 HARV. L. REV. 693, 698, 718–38 (1974).
All agree that Hanna held that any pertinent Federal Rule will apply, even in diversity cases, as long as it is valid under the Rules Enabling Act (REA), 28 U.S.C. § 2072 (2000), and under the Constitution. Hanna, 380 U.S. at 471–74. All also agree that the motivation for this holding was that testing the applicability of the Rules under the ordinary Erie test on a case-by-case basis “would eviscerate the Rules,” including Rules on such central matters as pleadings and discovery. Ely, supra, at 721. The remaining dispute is whether it was Congress in the 1934 REA or through the 1938 Rules that decided any Rules valid under the Act would have across-the-board applicability, or whether it was the 1965 Court in Hanna that decided to equate the Rules’ applicability to the validity test in order to insulate them from further Erie attacks.

Contrary to then prevailing views, Ely contended that Congress, with intent, had settled the potential Erie problem by providing for a set of Rules that were to apply in all federal cases, in diversity and otherwise. Id. His position admittedly finds some support in Hanna’s language. See 380 U.S. at 463 & n.3, 471, 474. Additionally, he went beyond any hints in Hanna to argue that, under the REA’s supersession clause, the Rules repealed all prior conflicting laws, including the Rules of Decision Act, 28 U.S.C. § 1652 (2000). Ely, supra, at 718. But there are strong countera rguments to his position.

First, Ely’s argument concerning legislative intent is weak. There is no relevant legislative history. In view of the chronology—the enactment of the REA in 1934, the promulgation of the Rules by the Supreme Court on December 20, 1937, the argument of the Erie case on January 31, 1938, the Erie decision on April 25, 1938, the effective date of the Rules on September 16, 1938, and the threat to the Rules starting only with Guaranty Trust Co. v. York, 326 U.S. 99 (1945), or Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)—it seems a bit far-fetched to attribute a legislative intent with respect to the effect of Erie on the Rules.

Second, the language of Hanna is ultimately ambiguous. Much of that language concerning Congress deals with its general power to prescribe valid Rules, not with its intention that every Rule should apply in every federal case. Hanna, 380 U.S. at 471–74. The Court arguably saw this latter question of applicability as left open by Congress and by the Rules and therefore appropriate for decision by the Court itself. The language of the Hanna opinion, id. at 472–73, and especially its telling quotation from Lumbermen’s Mutual Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963) (referring to affirmative countervailing considerations), can support the reading that—in recognition of the federal interests in uniformity of practice, the unity of the Rules, and their progressive content, and in view of the usually weak state interests and slight outcome-determinative effect—the Hanna Court decided under Erie, once and for all, that federal law should apply throughout the enclave of the Federal Rules. See Hanna, 380 U.S. at 472–74.

Third, Ely’s argument based on the REA’s repeal provision is not determinative for several reasons. One could argue that § 1652 comprises but part of Erie, and Erie may not be a “law” within the meaning of the REA’s repeal provision, and furthermore that Erie may not “conflict” with any valid Rules, but rather supplement them by providing when they are to apply. True, Federal Rule of Civil Procedure 1 provides that the Rules “govern the procedure in the United States district courts in all suits of a civil nature.” Fed. R. Civ. P. 1. Yet one could read Rule 1 as being consistent with Erie, in that the Rules are to govern only “procedure,” but state “substantive” law can displace them under Erie. Alternatively, one could sidestep Rule 1 by arguing that it
governed horizontal choice of law.\textsuperscript{59} The courts created this series of general rules by a sophisticated interest-balancing approach that resolved the vertical choice-of-law problem for a broad enclave of the law.\textsuperscript{60} The courts then relied on a tough stare decisis attitude to prevent the resultant general rule from later being eaten up by exceptions in appealing cases.\textsuperscript{61} The long-term product of this method would have been an extensive series of fairly workable and predictable general rules that, when laid end-to-end, approximated the line between state and federal law ideally mandated by the goals of \textit{Erie}.

Most recently, however, \textit{Gasperini v. Center for Humanities, Inc.},\textsuperscript{62} undercut any such sort of "generic balancing," or "sensitive rulemaking," approach. In that diversity case the Court uttered its last major words on \textit{Erie}, although it neglected to make them clear words. It left much to inference, but the Court at least held, first, that in the federal district court, New York's tort reform interests called for applying the state's aggressive new-trial standard for setting aside a jury verdict, but, second, that federal interests still counted enough to call for applying the deferential federal standard of appellate review in the federal court of appeals.\textsuperscript{63} Most significantly, the holdings reimposed a case-specific and issue-specific approach to balancing. First, the Court surprisingly decided to apply state law to the district judge's scrutiny of the jury decision,\textsuperscript{64} a matter lying in the heartland of the judge-jury relationship that had seemingly been confided to federal law by \textit{Byrd v. Blue Ridge Rural Electric Cooperative}.\textsuperscript{65} On that issue, the \textit{Gasperini} Court must have weighed the very specific state and federal interests at stake on a case-by-case basis, leaving little room for stare decisis to operate: only this kind of approach would have allowed federal judge-jury law to prevail over South Carolina's weak interests in \textit{Byrd}, while subjugating it to New York's stronger tort reform interests in \textit{Gasperini}. Second, as \textit{Gasperini}'s different result on the appellate issue exceeds the authorization of the REA and clashes particularly with Congress's intent to determine the Rules' reach by the REA's second sentence limiting substantive effect. Finally, because the \textit{Erie} doctrine did not reach into true procedure until after \textit{Ragan} in 1949, one could argue that this reach of \textit{Erie}, even if it is a "law" that "conflicts" with the Rules, was a later creation not affected by the REA's repeal provision.


\textsuperscript{60}See, \textit{e.g.}, supra note 58.

\textsuperscript{61}See, \textit{e.g.}, \textit{Day & Zimmerman}, 423 U.S. at 4.


\textsuperscript{63}Id. at 426-31.

\textsuperscript{64}Id. at 436-38.

\textsuperscript{65}356 U.S. 525, 539 (1958) (applying federal law to provide that the jury should decide a certain factual issue).
proved, the Court balanced interests issue-by-issue\(^6\): only this kind of approach would have allowed the compromise of applying state law on one of the \textit{Erie} issues in a case, while federal law governed another.

In sum, my view is that the Supreme Court is currently committed to specific interest balancing. But, I stress, it is not essential to the rest of this Article that the reader share my view on judicial methodology.

\section{Resultant Realms of State and Federal Law}

So, the law on \textit{Erie} today is that the Constitution or Congress can make a binding choice of law, and also that federal law prevails if a Federal Rule covers the matter. Beyond those clear situations, the choice of law is left to the federal courts, to be performed by one methodology or another.

Nevertheless, the persisting dispute over judicial methodology does not in fact leave the question of governing law terribly unclear. In federal court today, state law will routinely apply in many situations. And, under any conceivable methodology, federal law very often applies in federal question cases and often even in diversity cases, as a consequence either of a constitutional or congressional choice or of an already decided or relatively predictable judicial choice-of-law decision. The lack of clarity on vertical choice of law extends only to a relatively small group of hard cases, and therein lies the explanation of how our system can live with the lack of clarity.\(^6\)

A prime example of a hard case lay in \textit{Clearfield Trust Co. v. United States},\(^6\) where the Court chose federal law, perhaps questionably, and then created federal law to govern rights and duties of the United States on its commercial paper.\(^6\) More generally, when will the federal courts on their own choose federal law and so displace state law? This problem, sometimes called the "\textit{Clearfield} problem,"\(^7\) is no more than a restatement of the \textit{Erie} problem described above. If the judicial choice-of-law methodology developed under \textit{Erie} ends up pointing to federal law rather than state law, then the federal courts will choose federal law: besides \textit{Clearfield}, examples range from the normal filling of federal statutory interstices to inferring a private cause of

\begin{thebibliography}{99}
\bibitem{66} \textit{Gasperini}, 518 U.S. at 431–36.
\bibitem{67} See \textit{WRIGHT \& KANE}, supra note 6, § 59.
\bibitem{68} 318 U.S. 363 (1943) (treating effect of the United States’ delay in notifying check’s endorser of forgery).
\bibitem{69} \textit{Id.} at 366–69.
\end{thebibliography}
action from a federal statute.\textsuperscript{71}Crudely put, the result of this judicial
choice of federal law has been the formation of a series of “enclaves”\textsuperscript{72}
where federal common law normally prevails, including “such narrow
areas as those concerned with the rights and obligations of the United
States, interstate and international disputes implicating the conflicting
rights of States or our relations with foreign nations, and admiralty
cases,”\textsuperscript{73}and also the area of uncodified federal procedure.

b. Content of Federal Common Law

If the choice points to federal law, the further question of its con-
tent arises. Oftentimes when federal law governs by nonjudicial
choice, the Constitution or Congress goes on to formulate the content
of the applicable federal law, which of course is then binding on the
federal courts. But in the two situations where federal law governs but
the Constitution and Congress have not formulated the applicable
federal law, the federal courts must step in to formulate specialized
federal common law. First, the federal courts might have to formulate
the law pursuant to a constitutional or congressional declaration that
chose federal law but explicitly or implicitly delegated to the courts
the formulation of that law.\textsuperscript{74}Second, when the federal courts on
their own choose federal law, they also have to formulate its content,
as in Clearfield.\textsuperscript{75}Thus, the federal common law ends up with this
vague definition: the body of federal rules of decision whose content
did not come directly from interpreting federal constitutional or stat-
tutory provisions.\textsuperscript{76}

In performing the task of formulating that content of federal
common law, federal courts sometimes purely create common law or
more often simply extend some closely related or analogous federal
statutory provision.\textsuperscript{77}But most often federal courts opt to adopt as

\begin{itemize}
\item \textsuperscript{71}See, e.g., Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979) (inferring a private
cause of action in a Title IX case); Textile Workers Union v. Lincoln Mills, 353 U.S.
448, 456–57 (1957) (filling big gaps in the federal Labor Management Relations Act
with federal law fashioned from the policy of national labor laws).
\item \textsuperscript{72}Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).
\item \textsuperscript{73}Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (footnotes
omitted).
\item \textsuperscript{74}See \textsc{Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, \textit{Hart &
Wechsler's The Federal Courts and the Federal System} 695 (5th ed. 2003) [here-
inafter \textsc{Hart & Wechsler}]}
\item \textsuperscript{75}Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).
\item \textsuperscript{76}See Bellia, \textit{supra} note 5, at 832–33.
\item \textsuperscript{77}See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 146–47
(1987) (subjecting civil RICO action to Clayton Act’s four-year limitations period).
\end{itemize}

Adoption of state law is the dominant process because it is a simple route to take, tends to reduce the federal courts' involvement in lawmakers, and might also serve to accommodate any state interests that may be at risk (but of insufficient weight to require application of state law under \textit{Erie}). Indeed, whenever unformulated federal law is to govern, there is a rebuttable presumption in favor of adopting state law as the federal common law.\footnote{See United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979) (holding that in the absence of a federal statute treating priority of liens in connection with federal loans, federal courts should adopt the priority scheme of the appropriate state as long as that scheme is nondiscriminatory).} That is, federal courts should so adopt state law, unless there is a relatively significant federal interest in uniformity of the federal law throughout the nation or there are relatively important federal interests calling for a particular content to the federal law or for particular limits on the content.\footnote{Reassuringly, in this decision whether to adopt state law as federal law, the arguments in favor of formulating a federal content are similar to those that we shall see in the reverse-Erie scheme: affirmative countervailing considerations in favor of a federal content and an outcome-determinative factor representing the interest in uniformity of federal law nationwide. Cf. Neuborne, \textit{supra} note 5, at 778-80 (conflating reverse-Erie and adoption-of-state-law analyses).}

Such optional adoption of state law as the federal common law is distinguishable from the binding application of state law in federal court under \textit{Erie} in two big ways already intimated. First, when adopting a state's law, federal courts can adopt the appropriate state's law, rather than the law that the forum state would apply.\footnote{See, e.g., Kimbell Foods, 440 U.S. at 740 (applying the law of the state where the collateral was located).} Second, federal courts can reject state law that impinges on those federal interests calling for a certain content to or limits on the common law, so that a
federal court may alter or ignore part or all of the relevant state law in the particular case at bar.82

B. Law Applicable in State Court

Determining the applicable law in state court involves the reverse-Erie doctrine. Here, unlike in the Erie setting, the relevant federal law will always be pre-existing, whether of constitutional, congressional, or judicial origin.83 This fact means the Supremacy Clause is always in play.84 The reverse-Erie question thus becomes whether existing federal law should displace state law in state court under the Supremacy Clause. A role for preemption is obvious, but there is a role for judicial choice of law too.

The reverse-Erie question is a relatively simple one if the Constitution or Congress (or its authorized administrative delegate) actually chose to displace state law in state court. If the lawmaker expressly or impliedly made federal law applicable in state court, that choice to preempt is binding on the state courts under the Supremacy Clause, provided that any such choice was valid under the rest of the Constitution.85

However, in the absence of such a constitutional or congressional directive, and in the absence of binding precedent, the state courts and ultimately the U.S. Supreme Court must decide whether the existing federal law applies in state court.86 The courts do so by employing not only implied-preemption analysis but also a federally mandated judicial choice-of-law methodology similar to the Erie methodology. Just as the Erie methodology itself is specialized federal common law, the reverse-Erie judicial choice-of-law methodology is a federal-common-law creation of the U.S. Supreme Court that the state courts must follow.

If those reverse-Erie methodologies yield a choice in favor of federal law, that choice is binding on the state courts under the Supremacy Clause. Thus, Hinderlider v. La Plata River & Cherry Creek Ditch Co.,87 an interstate water case decided in an opinion by Justice Brandeis on the same day as his Erie opinion, held that substantive

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82 See, e.g., Holmberg v. Armbrecht, 327 U.S. 392, 395–97 (1946) (reading a federal tolling notion into a state statute of limitations for a particular federal action on a federally created claim).
83 See infra text accompanying notes 139–46
84 See supra note 18 and accompanying text.
85 See supra text accompanying notes 15–23.
86 See Bellia, supra note 5, at 840–45.
87 304 U.S. 92 (1938).
federal common law, which would govern in the federal courts, also binds the state courts. But if those methodologies yield a choice in favor of state law, the state is left free to create and apply it. Thus, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., on review of the Oregon Supreme Court, held that state law solely governed the disputed ownership of lands along a navigable river inside the state, after the lands had become riverbed because of avulsive changes in the river's course.

By such means a great amount of federal law—be it constitutional, statutory, or common law—flows down to apply in state courts. A lot of it arrives via the preemption doctrine, but some of it undeniably results from judicial choice of federal law for state courts.

1. Constitutional Limits on This Choice of Law

There exist constitutional limits on the powers of Congress and the Supreme Court to choose the applicable law for application in state court. The limits on imposing federal law on the state courts are quite significant, albeit in practice rather vague. Most prominently, the federal government cannot extend beyond the relevant boundaries demarcating the matters constitutionally reserved to the states.

Despite their significance, these constitutional limits are like those controlling the Erie scheme, and so do not warrant renewed discussion. It suffices here to observe anew that the Federal Constitution itself made some binding choices of law for state courts. The Due Process Clause of the Fourteenth Amendment provides a nice example.

2. Legislative Limits on This Choice of Law

Analogously to Erie, Congress can expressly or impliedly make the choice between state and federal law for application in state court, but of course only within constitutional limits. A valid congressional choice will bind the state courts. That is, if Congress chooses the applicable law, the only vertical choice-of-law question remaining for the courts is whether that choice was constitutionally valid, because the Constitution imposes the only bounds on the congressional power.
At the heart of congressional choice of law lies the doctrine of express preemption. For example, in some areas, such as patents, Congress can decide to regulate and then specify substantive laws that will apply in federal and state courts henceforth. Or Congress can provide procedural regulations for state courts' handling of certain types of federal-law cases. Indeed, the more illuminating choice-of-law problems in state courts arise as the disputed issue moves from the purely substantive to the more procedural. Substantive preemption is particularistic to some specific legal context, while displacement of state procedural law is more generalizable and hence revealing, just as the more procedural questions are the more instructive in the \textit{Erie} context.

In all such cases of express preemption, the courts are deciding only whether the federal statute was "meant" to displace state law. Sometimes that decision is a straightforward task. But Congress's purpose can be elusive. As the courts move from discerning implications toward making inferences and otherwise more self-consciously deciding the extent of federal law on their own, the courts tend to make less use of implied-preemption doctrine and terminology and to invoke more obviously a choice-of-law approach analogous to \textit{Erie}'s judicial choice-of-law doctrine.

3. Judicial Methodology for This Choice of Law

Analogously to \textit{Erie}, the courts must use some technique for choosing between state and federal law for application in state court, whenever—under the Constitution, federal statutes, and binding precedent—they may go either way. Also as in \textit{Erie}, the judicial choice-of-law cases best explicate the dividing line between state and federal law, and so deserve the most careful study. Finally, as that study will show, this judicial methodology relates more to the \textit{Erie} line of cases than to traditional preemption case law.


96 See Davis, \textit{supra} note 7, at 198–200.
a. Choice-of-Law Role for Courts, As Mandated by U.S. Supreme Court

Of course, reverse-\textit{Erie} predates the \textit{Erie} case,\footnote{See, e.g., Davis v. Wechsler, 263 U.S. 22, 24 (1923) (Holmes, J.) (rejecting a state pleading rule that deemed a federal official to have waived a federal venue defense in a state personal-injury case, and observing: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); S. Ry. v. Prescott, 240 U.S. 632, 639–41 (1916) (forcing federal common law on a state court as to the obligation of carriers under the Interstate Commerce Act); Cent. Vt. Ry. v. White, 238 U.S. 507, 510–13 (1915) (forcing federal common law on a state court as to the burden of persuasion under the Federal Employers’ Liability Act); Bellia, supra note 5, at 898 n.334.} just as the \textit{Erie} problem itself predates \textit{Erie}, both problems being as old as federalism itself. But sophisticated refinement of reverse-\textit{Erie} methodology had to await the modern developments on the \textit{Erie} front. Since \textit{Erie}'s decision, the leading reverse-\textit{Erie} cases on judicial choice of law have been \textit{Brown},\footnote{Brown v. W. Ry., 338 U.S. 294 (1949).} \textit{Dice},\footnote{Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952).} \textit{Felder},\footnote{Felder v. Casey, 487 U.S. 131 (1988).} and \textit{Johnson}\textsuperscript{101}—respectively, two early and two recent cases; two Federal Employers’ Liability Act (FELA) cases and two § 1983 civil rights cases; two sounding in judicial choice of law and two sounding in preemption; but all involving whether federal procedural law binds the state courts.

In \textit{Brown}, the plaintiff brought an FELA case in a Georgia state court, alleging that he had suffered injury while working when he stepped on a large clinker lying in the railroad yards, but he failed to allege the clinker’s circumstances in a way to constitute the railroad’s negligence and to exclude alternative causes.\footnote{\textit{Id}.} The railroad demurred. Contrary to federal practice, a Georgia rule construed allegations most strongly against the pleader and so resulted in dismissal of the plaintiff’s complaint with prejudice.\footnote{\textit{Id}.} The U.S. Supreme Court reversed, ruling that the Georgia pleading rule had to bow to the more lenient federal practice:  

\begin{quote}
Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. . . . Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for me-
\end{quote}
ticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.\textsuperscript{104}

In \textit{Dice}, the plaintiff brought an FELA action in an Ohio state court.\textsuperscript{105} The railroad’s defenses included a release of all claims that was signed by the plaintiff.\textsuperscript{106} The plaintiff contended that the purported release was void because he had relied on the defendant’s deliberately false statement that the document was merely a receipt for back wages.\textsuperscript{107} The Ohio Supreme Court, reversing the intermediate appellate court, sustained the trial court’s entry of judgment for the defendant notwithstanding the verdict, holding (1) that Ohio, not federal, law governed the validity of the release, and under that Ohio law the release bound the plaintiff, a man of ordinary intelligence who could read, even though a deliberately false statement had induced him to sign, and (2) that under controlling Ohio law, all issues as to fraud in the execution of this release were properly decided by the judge rather than by the jury.\textsuperscript{108} The U.S. Supreme Court reversed, holding that the more protective federal common law controlled the validity of the release and that the “factual” issues as to fraud had to be determined by the jury: “It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of procedure’ for denial in the manner that Ohio has here used.”\textsuperscript{109}

In \textit{Felder}, an arrestee named Bobby Felder brought a federal civil rights action in a Wisconsin state court against Milwaukee and certain of its police officers, alleging racially motivated police brutality.\textsuperscript{110} Al-
though the plaintiff had satisfied Wisconsin's three-year statute of limitations for general personal-injury actions, the officers moved to dismiss for failure to comply with Wisconsin's notice-of-claim statute.\footnote{Id. at 136.} That statute provides that, before any suit may be brought in state court against a municipality or its officer, the plaintiff must additionally give notice of the claim to the defendant within 120 days of the injury; that the municipality then has 120 days to act on the requested relief; and that the plaintiff must bring the suit within six months after notice of the claim's disallowance.\footnote{Id. at 136–37 (citing Wis. Stat. § 893.80(1)(a)–(b) (1983 & Supp. 1987)).} The defendants' motion ultimately succeeded in state court.\footnote{Id. at 137.} The U.S. Supreme Court reversed:

Because the notice-of-claim statute at issue here conflicts both in its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court.

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Just as federal courts are constitutionally obligated to apply state law to state claims, \textellipsis\ so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law \textsc{know} protected."\footnote{Id. at 138, 151 (Brennan, J.) (quoting Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942), and citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938)). Justice O'Connor's dissent expressly attacked the "reverse-Erie" tone of the majority as "a sort of upside-down theory of federalism." Id. at 161 (O'Connor, J., dissenting).}

Thus, although the Court's terminology moved toward preemption, its actual analysis came more overtly to resemble \textit{Erie}'s progeny.

In \textit{Johnson}, a worker named Kristine Fankell brought a federal civil rights action in an Idaho state court, alleging that she had been fired from her state government job without due process.\footnote{Johnson v. Fankell, 520 U.S. 911, 913 (1997).} The defendant officials unsuccessfully moved for dismissal on the ground of qualified immunity, and then tried to appeal immediately. The state supreme court dismissed the appeal under its finality rule, even though federal law would have allowed an interlocutory appeal.\footnote{Id. at 913–14.}
The U.S. Supreme Court affirmed. After noting "our normal presumption against pre-emption," it sequentially found (1) that the "dismissal of the appeal rested squarely on a neutral state Rule regarding the administration of the state courts," (2) that the federal interests at stake lay in the procedural appealability doctrine rather than in the substantive qualified-immunity doctrine, and (3) that application of the state rule was not "outcome-determinative" in the sense. It then balanced the state's "countervailing considerations" regarding "the operation of its courts" against the relatively weak federal interests, at least as the Court viewed them. Thus, the Court put a limit on federal intrusion into state court procedure.

What other quasi-procedural realms has the Supreme Court treated? The influence of the four leading cases has spread beyond their facts, to realms near and far. For example, federal law might apply in state courts on matters such as burden of proof, joinder, and venue. Federal attorney's fee law applies in state court on some federal claims, just as state attorney's fee law would normally apply in federal court on state claims. Similarly, the federal law of res judicata governs the effects of a federal judgment in a state court.

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117 Id. at 913 (Stevens, J., for unanimous Court). This case involved a defendant asserting a federal immunity, rather than a plaintiff asserting a federal right, but the analysis did not and should not turn on that point. See Peter W. Low & John C. Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 64–65 (5th ed. 2004). But see Larry L. Teply & Ralph U. Whitten, Civil Procedure 519–20 (3d ed. 2004).

118 Johnson, 520 U.S. at 918.

119 Id.

120 Id. at 919–20.

121 Id. at 920.

122 Id. at 922.


126 See, e.g., Graham C. Lilly, The Symmetry of Preclusion, 54 Ohio St. L.J. 289, 316 n.100 (1993) ("In essence, federal common law endows federal judgments with the same obligatory effects as the full faith and credit statute provides for state judgments . . . ."). This result follows from the strong federal interests in defining the
and, conversely, state res judicata law would normally govern the effects of a state judgment in a federal court.\textsuperscript{127}

The best illustrations of the reach of the Supreme Court's reverse-\textit{Erie} cases come from jury practice. The uncontroversial background is that state jury practice is widely similar to the federal, but it need not be; very importantly, the Seventh Amendment is not incorporated or implicit in Fourteenth Amendment due process, hence does not apply to the states, and so does not constrain state civil trials; and for state-law claims, the states in fact have generally not followed the Supreme Court's modern expansion of the jury right.\textsuperscript{128} Yet, federal jury practice may apply in state courts under the reverse-\textit{Erie} doctrine.\textsuperscript{129} In the converse situation, state jury practice normally does scope of federal judgments, in adapting that res judicata law to the federal procedural system, and in developing a uniform federal law of res judicata and a simple retroverse approach to judgments in a federal system. However, when the basis of federal subject matter jurisdiction in the first court was diversity, the Supreme Court has pronounced that this federal law will adopt the first court's local state law of res judicata as the federal common law, except when that state law is incompatible with federal interests. In \textit{Semtek International, Inc. v. Lockheed Martin Corp.}, 531 U.S. 497 (2001), the Court reviewed the respect a Maryland state court owed to a statute-of-limitations dismissal by a California federal court in a removed diversity case and held:

In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. . . .

. . . This is, \textit{it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.} . . .

This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.

\textit{Id.} at 508-09. Given the particular federal interests at play here, a better approach for diversity judgments might be to invert the Court's presumption, so as normally to apply a uniform federal res judicata law and only sometimes to adopt the state res judicata law, when state substantive policies spike high, such as for nonmutual collateral estoppel. \textit{See} Patrick Woolley, \textit{The Sources of Federal Preclusion Law After Semtek}, 72 \textit{U. Cin. L. Rev.} 527, 594-98 (2003).

\textsuperscript{127} \textit{See} 28 U.S.C. \textsection 1738 (2000). However, sometimes federal law has a role. Besides existing exceptions to \textsection 1738, the state res judicata law itself is not free of federal command. Most importantly, due process requires that the state not preclude on the basis of a judgment if the proceedings did not afford a full and fair opportunity to litigate. That is, the state must have a basically fair res judicata law, which will apply in that state's own courts as well as in federal court to specify the effects of that state's judgments. \textit{See} Kremer v. Chem. Constr. Corp., 456 U.S. 461, 480-83 (1982).

\textsuperscript{128} \textit{See} RICHARD H. FIELD, BENJAMIN KAPLAN \& KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 133-34, 1414 (8th ed. 2003).

\textsuperscript{129} \textit{See} Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 492-93 (1980) (holding that, in state court FELA cases, federal law governs jury instruction); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (holding that, in state court FELA cases, federal law governs jury right). The Supreme Court has followed \textit{Norfolk}, looking to
not apply in federal courts under the *Erie* doctrine. And so some dissimilarity between reverse-*Erie* and *Erie* begins to emerge.

b. Choice-of-Law Role for Courts, As Applied by State Courts

State courts provide cases similar to the U.S. Supreme Court cases. State courts could potentially produce most of the reverse-*Erie* law. Yet these state cases are not terrifically illuminating, be-

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131 See infra text accompanying notes 169-72 (explaining dissimilarity).

132 See Neuborne, supra note 5, at 770-75.

133 The question of what law applies in state court could arise in a lower federal court. For example, that question implicitly arises when the federal court, in the course of deciding an *Erie* choice-of-law issue, considers the outcome-determinative factor and hence must resolve what law would apply in state court. But the fact is that no federal court has waxed informative in that setting on the subtleties of reverse-*Erie*.

The question arises more explicitly when the federal court, having decided that state law applies in the federal court under *Erie*, considers the state law's content and hence the extent to which federal law has preempted or displaced state law. Although this setting could conceivably generate frequent and enlightening discussion of reverse-*Erie*, the overwhelming majority of federal cases that get into explicit discussions are admiralty cases, apparently because the Supreme Court so framed the issue in one such case. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) ("[T]he extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards."). Most of these admiralty cases just observe that the same substantive law applies in state and federal courts, so that diversity and admiralty claims should receive the same treatment. See, e.g., Dluhos v. Floating & Abandoned Vessel, Known as “New York,” 162 F.3d 63, 73-74 (2d Cir. 1998). However, some admiralty cases, in the course of determining the law for application in federal court, get into more interesting discussions of preemption of state law. See, e.g., Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 626-31 (1st Cir. 1994) (allowing application of a Rhode Island statute for recovery of economic loss from damage to natural resources).

Only occasionally do lower federal courts, in other than these quintessentially *Erie* settings, decide directly whether the state court itself would apply federal law. For example, a federal court might have to decide if preemption makes a state-law claim
yond suggesting that state courts are dutiful in trying to follow the U.S. Supreme Court’s lead, at least when they see the issue.\textsuperscript{134}

Thus, in adjudicating federal-law claims, state courts apply federal law on clearly substantive questions,\textsuperscript{135} and generally state courts ap-


There are literally millions of state cases applying reverse-\textit{Erie}, because the choice-of-law issue is ubiquitous. \textit{See James E. Pfander, Principles of Federal Jurisdiction} § 6.5, at 138 (2006) (noting that the “problem arises with monotonous regularity”). But most such applications are intuitive. Few cases shed light on the appropriate methodology. A search for all state cases in Westlaw that were aware enough to refer to reverse-\textit{Erie} by name yields only forty-seven cases through 2005. Again, most of these cases, thirty-seven of them in fact, were admiralty cases, which carefully followed the complicated relationship there between federal and state law. \textit{See, e.g.}, Rodrigue \textit{v.} LeGros, 563 So. 2d 248, 253 (La. 1990) (“As the author of the only treatise on the relationship between state law and federal maritime law has explained the process, courts balance the ‘federal interest against the countervailing state interests in regulating local activity and in providing relief to its citizens from personal injury impairment.’” (quoting \textit{David W. Robertson, Admiralty and Federalism} 195 (1970))). The ten nonadmiralty cases are cited and discussed \textit{infra} notes 135–37 and accompanying text. It is worth noting that the only U.S. Supreme Court review given to any of these forty-seven cases affirmed the highest state court’s application of the state law of forum non conveniens, after that state court had reversed the lower courts’ application of federal law. \textit{Am. Dredging Co. v. Miller}, 510 U.S. 443, 447 (1994).

135 \textit{See, e.g.}, Johns \textit{v.} Haborage I, Ltd., 664 N.W.2d 291, 297 (Minn. 2003) (ruling that federal law governs successor-employer liability under Title VII); \textit{Mfrs. Auto Leasing, Inc. v. Autoflex Leasing, Inc.}, 139 S.W.3d 342, 346 (Tex. App. 2004) (ruling that
ply state law on clearly procedural questions. On the classic problems in between, such as statutes of limitations, the state courts come out the same way on reverse-\textit{Erie} that federal courts do in the \textit{Erie} setting, with each deferring to the other sovereign.

If the state court determines that federal law governs, then the state court applies it. The federal law might be constitutional, statutory, or common law; it might be purely federal, or it might involve state law adopted as federal common law; it might be fully formulated or more incipient. Sometimes the state court has to be the very first to enunciate federal law. It has authority to do so, if it decides in accordance with existing federal law by trying to discern what the federal courts would decide is the law, rather than by undertaking to formulate federal law either in pursuit of strictly forward-looking policies that might guide a legislature or in accordance with nonpositivist principles that might guide a freely law-creating court. That is, the state court should act as federal courts do when applying state law under federal law governs the standard for enhanced damages under the Federal Telephone Consumer Protection Act (TCPA)).


138 \textit{See} 19 \textit{WRIGHT ET AL.}, \textit{supra} note 125, \S 4511 (summarizing \textit{Erie} resolutions of the classic problems).

139 \textit{See} Bellia, \textit{supra} note 5, at 889.
In both the *Erie* setting and the reverse-*Erie* setting, the court's job is to apply the other sovereign's law, not to create law for it. If the content of the governing federal law is really unclear, how should the state court determine that content? No undisputed answer exists to this pervasive question, which is obviously fundamental enough to occur regularly to my first-year students and which is thus illustrative of how unexplored all reverse-*Erie* matters remain. Specifically, the question of whether state courts are bound by lower federal courts on the federal law's content remains open. The better view—mainly trying to effectuate the constitutional status of state courts, while accepting some local disuniformity in the short term—is that the state court should try to determine what the U.S. Supreme Court would rule. On the one hand, the state court should not consider itself actually bound, rather than merely informed, by the local federal courts' rulings. On the other hand, the state court would naturally be bound under stare decisis by decisions within the state's hierarchy of courts as to the federal law's content.

This closer consideration suggests that *Erie* and reverse-*Erie* do not impose strictly the same task on the courts: *Erie* is telling the federal court when to apply and if necessary create federal law, while re-

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141 No federal statute authorizes certification of unsettled questions from state courts to a federal court. Indeed, certification to a lower federal court, rather than to the U.S. Supreme Court, would denigrate the state courts' status as equally competent enunciators of what the Supreme Court would say as to federal law. Cf. FIELD ET AL., *supra* note 128, at 346–47 (criticizing certification by federal courts to a state court on additional grounds).

142 Comparatively thorough treatment appears in WRIGHT & KANE, *supra* note 6, § 45, at 294 n.25 (noting "interesting question" in footnote).

143 See United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir. 1970); Corp. Sec. Group v. Lind, 753 So. 2d 151, 152 (Fla. Dist. Ct. App. 2000) ("Thus it is clear that we did not simply decide to follow the holding of the local federal appellate court on this issue. Instead we applied a 'reverse-*Erie* method in which we felt obligated to decide the issue as we believed the United States Supreme Court would do so if it were instead considering the matter." (footnote omitted)); Hall v. Pa. Bd. of Prob. & Parole, 851 A.2d 859 (Pa. 2004); Bellia, *supra* note 5, at 839 n.64; cf. Charles L. Black, Jr., *Is the State of Georgia in the Fifth Circuit?*, 81 YALE L.J. 30, 31 (1971) ("[T]he political structure known as 'The State of Georgia' is in no sense and in no way encompassed 'within' the appellate power of the [then] Fifth Circuit."). But see Yniguez v. Arizona, 939 F.2d 727 (9th Cir. 1991). See generally Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143 (1999) (describing the division in case law, but concluding, as do other scholars cited therein, in favor of the view expressed in the text above).
verse-Erie is telling the state court when to apply existing federal law so as to displace state law under the command of the Supremacy Clause. The state court may have to envisage a federal court’s Erie analysis to determine the reach of federal law, and may have to enunciate unclear federal law, but it is merely a federal-law-applier and will never act as a federal lawmaker in the true sense. To say it once again, it will decide in accordance with existing federal law, but never create federal law. Still, the difference does not deserve exaggeration. After all, in theory the lower federal courts too are attempting to discern what the Supreme Court would do.

Finally, do note the profound implication of this view of the state court role: it makes the state courts into judicial hierarchies that can independently enunciate federal law, parallel to the lower federal courts and subject only to rare U.S. Supreme Court review. A state is not bound by any coequal court system, either the lower federal courts or, for that matter, another state’s courts. But a state is not free just to go its own way, because at bottom we are talking about a state applying federal law under the constraint of the Supremacy Clause. This is no place to let a thousand flowers bloom. The state courts are under a duty to follow what the U.S. Supreme Court has decided or would rule.

144 See Dinh, supra note 32, at 2088–92 (showing that the Supremacy Clause applies only to existing law).

145 Among practical reverberations, this view complicates any consideration of the outcome-determinative factor in reverse-Erie analysis, albeit in a way perhaps too rarified to be taken into account by courts. As one court has explained:

Under the Erie doctrine, of course, a federal district court must apply the law of the state in which it sits when ruling on state law questions. Thus, whether a case comes before a state or a federal court does not affect what law will govern its resolution.

When the case involves a federal question, however, the reverse of Erie does not apply. “[T]he Supremacy Clause imposes on state courts a constitutional duty ’to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.’” State courts need not, however, apply the law of the federal district in which they sit when ruling on questions of federal law. Thus, the law governing a particular case may differ depending on whether the case winds up in a state or federal courts.


c. Judicial Choice-of-Law Methodology, Fleshed Out

All this reverse-Erie case law has established that state courts must perform a choice-of-law process mandated by the U.S. Supreme Court. Admittedly, the cases fail to express a clearly developed choice-of-law methodology, often not going beyond a wooden reference to preemption here or some vague reference to Erie there. Teasing out a methodology therefore becomes the project.

Reading the evocative state cases—those that raise a quasi-procedural issue in a federal claim when neither express preemption nor even direct conflict with a federal statute is in play—generates a realization that here any search for preemptive congressional intent is unrealistic and that the courts must on their own face competing state and federal interests. In other words, the problem has morphed from classic preemption into a choice of law that requires an Erie-like judicial methodology.

Then, upon closer examination, the courts in many of these reverse-Erie cases do appear to employ a judicial choice-of-law methodology at least similar to the one worked out by the Erie line of cases down to Gasperini, most often doing so implicitly but sometimes explicitly.\textsuperscript{147} In my view, the lower courts, just as the Supreme Court did in Johnson,\textsuperscript{148} balance the state’s interests in having its legal rule applied in state court on this issue in this case against the federal interests in having federal law displace the rule of this particular state, while trying to avoid differences in outcome.

Just as in the Erie setting, reverse-Erie balancing means no more than the contextualized exercise of judgment in the face of competing interests.\textsuperscript{149} There are other statements of the choice-of-law standard floating around, such as that federal common law applies in the state courts when a federal rule of decision is “‘necessary to protect

\textsuperscript{147} See, e.g., Milstead v. Diamond M Offshore, Inc., 676 So. 2d 89, 94 (La. 1996) (observing in an admiralty case that “the United States Supreme Court has made clear that the decision whether to apply a state rule must be based upon a balancing of state and federal interests”); Mountain States Tel. & Tel. Co. v. Comm’r of Labor & Indus., 608 P.2d 1047, 1060 (Mont. 1979) (“weighing and balancing state and federal interests” under NLRA), appeal dismissed, 445 U.S. 921 (1980); Local 1804, Int’l Longshoremen’s Ass’n v. Waterfront Comm’n, 428 A.2d 1283, 1288 (N.J. 1981) (“balancing” in an ERISA case); Axess Int’l Ltd. v. Intercargo Ins. Co., 30 P.3d 1, 7 (Wash. Ct. App. 2001) (observing in an admiralty case that the result “depends on a balancing of the federal and state interests involved”).

\textsuperscript{148} See Johnson v. Fankell, 520 U.S. 911, 918–22 (1997).

\textsuperscript{149} See supra text accompanying notes 55–57.
uniquely federal interests," but any such statement seems to represent more a specific application of the balancing test than a comprehensive formulation.

It is also worth noting, with respect to the amount of federal law injected into the state courts, that balancing does not dictate either intrusive or deferential results. The outcome of balancing depends on the weights given the various recognized interests. Using balancing, one could, for example, still champion outcomes of judicial choice of law that greatly favor state law, based on the view that (1) courts should not be active articulators of governmental interests or (2) our constitutional scheme supports a presumption in favor of state interests and hence in favor of state law in state courts. Although my discussion here focuses on methodology, and not necessarily on outcomes, I would nonetheless argue for carrying over the interests and their weights as worked out in the Erie setting. First, countering the argument as to the passive role for courts, reverse-Erie is easier to justify than Erie itself. Erie sometimes involves the creation of federal law by the federal courts, but reverse-Erie merely has state courts deciding whether existing federal law displaces state law. Although the state courts can create state law, they cannot create federal law. Second, countering the argument as to the weightiness of state interests, there is no reason that state interests in state court should weigh more heavily than federal interests do in federal court. Any presumption here in favor of state law, like the presumption against preemption, is more a figure of speech than a real rule. The very existence of the Supremacy Clause would seem to suggest as much.

152 See, e.g., Clark, supra note 19, at 1413–19; Paul Wolfson, Preemption and Federalism: The Missing Link, 16 Hastings Const. L.Q. 69, 88–102 (1988); Young, supra note 14, at 132. But see, e.g., Redish & Sklaver, supra note 5, at 105–08.
153 See supra text accompanying note 144. One cannot, however, turn the argument around to champion more intrusive injection of federal law into the state courts. After all, state courts could not and would not be more active than the federal courts in articulating federal interests.
154 See Davis, supra note 7, at 222; Dinh, supra note 32, at 2092–97; Nelson, Preemption, supra note 27, at 290–303; cf. James J. Brudney & Corey Ditslear, Canons of Construction and the Elusive Quest for Neutral Reasoning, 58 Vand. L. Rev. 1, 111 (2005) (“The malleability of these language canons, and the uncertain weight and cyclical fashionability of certain substantive canons, should serve as a warning against unduly ambitious claims on their behalf.”).
155 Here it is possible to turn the argument around to champion more intrusive federal law in state courts. Any spillover from Supremacy Clause notions (and any
So, the reverse-Erie balance should, and does, closely resemble the Erie balance. In fact, the basic methodologies are the same. Courts balance state interests, federal interests, and outcome differences. Yet the last of those three factors plays out a little differently in the different settings of state court and federal court. Let me explain by fleshing out the details of balancing.

To begin, an Erie-like outcome-determinative effect belongs on the reverse-Erie balance, just as Felder unambiguously ruled.156 Courts do and should yearn to avoid different outcomes in state and federal court. But to be more specific about state court choice of law requires another look back to Erie’s progeny on choice of law in federal court.

\[^{156}\text{Felder v. Casey, 487 U.S. 131, 138, 141, 151–53 (1988). But see Linda J. Silberman, Allan R. Stein & Tobias Barrington Wolff, Teacher’s Manual, Civil Procedure 111 (2d ed. 2006) (“Note one key difference between this doctrine and Erie: the parties, in most cases, had the equal ability to bring or remove the case to federal court. Thus, concerns about ‘outcome determination’ are normally misplaced; if either party wanted access to federal procedures, they could have, in most cases, brought the case there . . . .” (citations omitted)).}\]
The Court in *Hanna* formulated, by extended dicta, a refined version of its earlier outcome-determinative test. Under this refinement, the courts should look not to mere differences in outcome, but only to differences in law that would undermine “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.” By this phrase, as illuminated in later cases, the Court apparently referred to the federal interest in avoiding those differences between the law applied in the federal court and in the forum state court (1) that would inflict the systemic costs of forum-shopping between federal and state courts by plaintiff or defendant or, much more importantly, (2) that would cause the unfairness of treating similarly situated persons differently in a substantial way simply because certain classes of people have a choice of court systems, whether the comparison is between plaintiff and defendant or between party and hypothetical party identical in all but citizenship. Under *Erie*, therefore, the federal courts should lean toward applying state law when necessary to avoid differences that are significant in either of those two ways.

Likewise under reverse-*Erie*, there is a federal interest in the uniformity of law applied in federal and state court. As to forum-shopping, there should still be some desire to avoid shopping by plaintiffs or defendants between the two systems. As to inequitable administration of the laws, there is still an unfairness in that certain classes of people have a choice of court systems. However, here the bigger danger is choosing among state court systems on matters of federal concern, rather than between state and federal court systems, because usually albeit not always the parties have equal access to federal court. That is, the emphasis should shift somewhat to interstate shopping, rather than worrying mainly about intrastate shopping. Federal rights and duties should not vary from state to state. Any horizontal legal differences will produce forum-shopping and inequitable administration in the reverse-*Erie* setting similar to the vertical dangers feared in the *Erie* setting. The constant interest in avoiding such dangers means that a comparable outcome-determinative effect should receive about the same weight in each setting.

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160 See *Shaw v. Leatherberry*, 706 N.W.2d 299, 310 (Wis. 2005) (holding in a § 1983 action that the ordinary federal standard of proof displaces the state’s elevated standard of proof for police-brutality cases, and observing among other factors that applying state law would “disrupt the federal interest in uniformity” and that “allowing different burdens of proof for the same action, based solely on where the
Note, finally, that for reverse-Erie the outcome-determinative effect (OD) should add to the other federal interests in having federal law applied in state court (affirmative countervailing considerations, or ACC), because applying federal law would avoid outcome-determinative differences among federal and state courts. In other words, the outcome-determinative effect becomes a reason not to apply state law. Accordingly, the formulation most analogous to an Erie balance of [state interests versus (ACC - OD)] is, for reverse-Erie, the balance of [state interests versus (ACC + OD)].  

C. Interrelating the Doctrines

Return the focus to the whole subject of applicable federal and state law in state court, including both preemption and judicial choice of law. The foregoing analysis revealed that considerable federal law flows down to apply in state courts. In areas of strong federal concern, such as clearly "substantive" areas of great federal interest, federal law applies in state court, sometimes even by direct constitutional command. As one moves into more "procedural" areas of both federal and state concern, the hard reverse-Erie cases arise. Finally, as one moves into clearly "substantive" areas of great state concern, state law more surely governs, often by constitutional necessity.

161 In both Erie and reverse-Erie, the formula balances the forum's interests minus OD versus the other sovereign's interests. The two doctrines are thus symmetrical theoretically. But the shifting side for OD could conceivably induce a circularity in application of procedural law, with the federal court applying state law in pursuit of conformity and the state court ironically applying federal law on the same issue in the same pursuit of conformity. Cf. Gelfand & Abrams, supra note 4, at 987 n.155 ("In a manner quite parallel to the operation of renvoi in choice of law practice, a federal court asserting diversity jurisdiction over a case raising federal questions (by way of defense) should apply state law (Erie, including a fair amount of state procedure), but the state courts must apply federal law (Dice, including a fair amount of federal procedure), so the federal court imitates the state court which is imitating the federal courts, and thereby ends up following federal law in diversity. It may be helpful to think of this in terms of a dog chasing its own tail.").

Reassuringly, this highly unrealistic result could never occur in actuality, because the Erie balance always must precede the reverse-Erie balance and so the state court will know if the federal court would apply state law. That is, even in state court, the first question is what law the federal court would apply; and if the answer is state law, then under reverse-Erie the state court will likewise apply state law, because only state interests persist. See supra text accompanying note 144.
Viewed broadly in this way, the reverse-Erie subject makes sense, and it also appears quite similar to Erie. Judge Henry Friendly, seeing a harmonious unity, nicely expressed the symmetry:

The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed or the basic scheme of the Constitution demands—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made. We may not yet have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of Erie [with reverse-Erie] has brought us to a far, far better one than we have ever known before.162

1. Troubling Asymmetry Between Erie and Reverse-Erie

Unfortunately, the Friendly quotation misleads somewhat. The actually prevailing scheme does not render reverse-Erie simply the mirror image of Erie.163

a. Intrusiveness of Reverse-Erie

The major difference is that reverse-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. For example, according to Brown, in the state court the Georgia pleading rule had to bow to the more lenient federal practice.164 In the

163  See Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 319 (5th Cir. 1987) (“Therefore, if the ‘reverse-Erie’ doctrine is perfectly symmetrical, it follows that state courts are not obligated to apply federal forum non conveniens analysis in maritime cases. We reject this facile syllogism; drawing conclusions from metaphors is dangerous. . . . Because the Erie diversity doctrine and the ‘reverse-Erie’ maritime doctrine spring from distinct principles and policies, there is no reason to expect a perfect symmetry between them.”), rev’d on other grounds, 486 U.S. 140 (1988).
164  Brown v. W. Ry., 338 U.S. 294, 298-99 (1949) (holding that, in a state court FELA case, federal law trumps the more demanding state pleading practice); see also Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (holding that, in a state court FELA case, jury trial was a basic part of the federal rights).
analogous *Erie* setting of a diversity case, a federal court would never bow to a contrary state pleading practice.165 There can be no doubt, despite the debate, that upon the proper comparison—say, comparing the whole range of applicable law for federal causes of action in state court to that for state causes of action in federal court—reverse-*Erie* is more intrusive than *Erie.*166

Perhaps one might try to ascribe any excessive zeal for federal law to the fact that initially the key reverse-*Erie* cases of *Brown* and *Dice* involved the pro-plaintiff FELA or that they were decided in the heyday of the Court's outcome-determinative test. However, recent cases such as *Felder,* which apply federal law other than in favor of FELA plaintiffs, rebut such explanatory attempts.167 *Brown* and *Dice* today stand for a broadly, even if not deeply, intrusive principle.168 All such restricted explanations fail. One must instead accept the generalized explanation: federal law is more puissant than state law and hence more intrusive.

Nevertheless, much state law that interferes with federal interests still applies in state court. One therefore must confront the major puzzlement of reverse-*Erie*: why are federal interests not so potent as to push aside all state law that gets in their way in state court? That is, once federal supremacy comes into play, how can the dam hold against the flood of federal law? The elusive explanation is that the

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165 See Hanna v. Plumer, 380 U.S. 460 (1965), discussed *supra* note 58; Cohen v. Office Depot, Inc., 184 F.3d 1292 (11th Cir. 1999), vacated in part on other grounds, 204 F.3d 1069 (11th Cir. 2000).

166 See Wright & Kane, *supra* note 6, § 45, at 293 (concluding that the role for federal law is so extensive that state procedure's role is "de minimis"); cf. Redish & Sklaver, *supra* note 5, at 105–08 (arguing for a very intrusive reverse-*Erie* doctrine). *But see Silberman et al., supra* note 156, at 111 ("It is thus not surprising that the Supreme Court has been far less protective of federal procedures in state courts than it has been of state procedures in federal court."); cf. Low & Jeffries, *supra* note 117, at 57 (conveying only a part of reverse-*Erie* and so entitling its coverage as "Notes on the Occasional Duty of State Courts to Apply Federal Procedures").


168 This principle does not mean, however, that *Dice'*s jury holding applies across the board, because choice of law would take into account the federal substantive setting. Nor does it mean that *Brown'*s pleading holding applies across the board, because choice of law would take into account the state's particular rule in question. It means only that today the intrusion of *Brown* and *Dice* applies beyond the FELA and particular state rules.
intrusiveness of federal law comes through a sluice gate, located at the preemption side of reverse-*Erie* rather than on its judicial balancing side.

b. Preemption

The explanation for the discrepancy between the reaches of federal and state laws under reverse-*Erie* and *Erie* is that the Supremacy Clause plays a nonobvious role through the preemption doctrine. Conflict preemption works in favor of federal law by rejecting not only any state law that openly discriminates against or contradicts federal law but also any state law that otherwise imposes unnecessary burdens upon federal rights, as in the two examples of *Brown* and *Dice*, which lie just within the outer boundary of conflict preemption.\(^ {169}\) Preemption so acts regardless of the outcome of any balancing methodology. Accordingly, federal law spills down into state court much more than state law applies in federal court, but only where conflict preemption reigns.

The preemptive federal law might be constitutional, statutory, or common law. For one example, federal defenses to state-law claims, like qualified immunity, should apply much more commonly in state court than do state defenses to federal-law claims in federal court.\(^ {170}\) So too should federal procedural law spill down more easily than state procedural law flows up.\(^ {171}\) Or, to return to that *Brown* example and at last explain it, the state’s anti-plaintiff pleading rule fell because the Court saw it as directly colliding in that case with the pro-plaintiff *FELA*.\(^ {172}\) The result was a preemption that rejected any state interests. In the converse-*Brown* setting, when the question would be whether a state’s pro-plaintiff pleading rule applies in a diversity case, the *Erie* balance manages to tilt in favor of the federal pleading law. That is, federal procedural interests overcome the interests in favor of applying state law, even to the extent of establishing *Hanna*’s blanket approach for the Federal Rules.\(^ {173}\)

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170 See supra note 117 and accompanying text.

171 See Drahozal, supra note 15, at 84–86.

172 See supra text accompanying notes 102–04 and notes 164–68 and accompanying text; see also Ill. Cent. Gulf R.R. v. Price, 539 So. 2d 202, 205–06 (Ala. 1988) (ruling that the content of Fed. R. Civ. P. 25(a) governs under *FELA*). This holding is supported by the fact that there is no equivalent of *Hanna* for blanket protection of state procedural rules from preemption.

causes federal procedure to preempt state procedure,\textsuperscript{174} but in converse-	extit{Brown} the Supremacy Clause obviously plays no comparable role to cause the state sovereign's law to trump any conflicting rules of the home court.

c. Judicial Choice of Law

Now consider reverse-	extit{Erie} as the situation moves from direct collisions between state and federal laws, to obstacle preemption and other situations where it really is the court determining the extent of the federal law. Then, although preemption terminology might remain in play, reverse-	extit{Erie}'s balancing methodology is phasing in and taking over in reality. In this zone, where one encounters cases like \textit{Felder} and \textit{Johnson} just inside the border of judicial choice of law,\textsuperscript{175} the court performs a more truly independent role through balancing.

Because of the similarity of their balancing methodologies, reverse-	extit{Erie} and \textit{Erie} look much more alike here. Indeed, as developed in a previous section, neither theory nor practice suggests that much of a discrepancy in results exists.\textsuperscript{176} There is no need, just in order to explain the greater intrusiveness of federal law, for the judicial choice-of-law balances to favor federal law or otherwise to become asymmetrical as between reverse-	extit{Erie} and \textit{Erie}. The operation of preemption by itself adequately explains that greater intrusiveness.

2. Troubling Symmetry Between \textit{Erie} and Reverse-\textit{Erie}

The relative intrusiveness of reverse-	extit{Erie}, caused by locating conflict preemption (as in \textit{Brown} and \textit{Dice}) next to normal judicial balanc-

\textsuperscript{174} Cf. \textit{Brown}, 338 U.S. at 296 ("[A] federal right cannot be defeated by the forms of local practice.").

\textsuperscript{175} See Dinh, supra note 32, at 2103–05. Compare Felder v. Casey, 487 U.S. 131, 138 (1988) (displacing the state's notice-of-claim statute for a federal civil rights case in state court), with Johnson v. Fankell, 520 U.S. 911, 922–23 (1997) (refusing to displace the state's appealability doctrine for a federal civil rights case in state court). \textit{Felder} is a difficult read. See Susan N. Herman, \textit{Beyond Parity: Section 1983 and the State Courts}, 54 Brook. L. Rev. 1057, 1066–70, 1093–94 (1989). Some commentators criticize \textit{Felder} as going beyond the conflict-preemption precedents, but such criticism fails to consider the case as a proper exercise of the judicial choice-of-law function. See \textit{Hart & Wechsler}, supra note 74, at 450, 461–62. Although the state's notice-of-claim statute did not conflict with the federal civil rights statute, there were strong federal interests in favor of applying federal law in state court. \textit{Johnson}, on the other hand, provides an example of state procedural law applying in state court, while federal procedural law would apply on the same point in federal court.

\textsuperscript{176} See supra Part I.B.3.
ing (as in Felder and Johnson), necessitated the foregoing discursion. But in absolute terms, how much more intrusive is it than Erie?

a. Similarity of the Doctrines

When all is said and done, the extent of the extra intrusion of federal law into state courts, as compared to the intrusion of state law into federal courts, is rather limited. Reverse-Erie certainly does not wholly displace state procedure. Generally, “federal law takes the state courts as it finds them.” Moreover, the extra intrusion is not at all discombobulating theoretically. To say that conflict preemption can sometimes be intrusive is merely to observe that the Supremacy Clause resolves conflicts between the sovereigns’ laws in the federal law’s favor. Conflicting state law will fall, because no argument of countervailing state interests can prevail. Thus, the reverse-Erie and Erie doctrines are in fact not terribly disproportionate or ill-meshing.

So minimizing the discontinuities ironically raises the opposite challenge of justifying the use in the reverse-Erie situation of methodologies that are very similar to Erie’s approach. Indeed, it is not the asymmetry that disturbs many observers, it is this remaining symmetry. They think that the role of the Supremacy Clause in reverse-Erie

177 See 16B Wright et al., supra note 125, § 4023, at 358 (“There is no apparent formula to capture and define the decisions. At the same time, there is little reason to suppose wholesale rejection of state procedure. The Federal Rules of Civil Procedure will not become binding on state courts when they undertake to enforce federal rights. The intrusions of federal procedure, although difficult to predict in detail, will not be that pervasive.”); Meltzer, supra note 29, at 1182–83; cf. Jackson, supra note 5, at 133 (“It may be that lawyers’ learning that ‘you take the state courts as you find them,’ for the purposes of adjudicating federal claims, is, notwithstanding important exceptions, so well established, that it does not occur to lawyers who have chosen to litigate in state courts to seek the use of federal procedures. I am not aware of recent evidence of a substantial problem of state court procedures (as compared to those in federal courts) systematically interfering with the enforcement of federal rights . . . .” (footnotes omitted)).

178 Wholesale displacement would be constitutionally troubling, see Hill, supra note 5, at 413; supra note 14, but reverse-Erie stops well short of violating any anti-commandeering or similar federalism principle that may exist as to state courts. Compare Bellia, supra note 16, at 970–92 (examining limits imposed by federalism in state-law cases), with Redish & Sklaver, supra note 5, at 75–90 (examining broad federal power to commandeer state courts from historical, textual, and political perspectives).

should produce a very different doctrine from *Erie*.\(^{180}\) Why should reverse-*Erie* resemble *Erie* at all?

Basically, *Erie*-like methodologies apply to reverse-*Erie* because, despite the underlying principle of federal supremacy, the same notion of cooperative federalism applies in both situations, calling for comity when one sovereign is enforcing the other's law. The problem is the same. The only reason the reaches of state and federal laws, in the converse settings, differ at all is that the underlying principle of federal supremacy tilts the playing field for competing state and federal interests. Whenever state law and federal law directly collide, preemption applies. The contest is over. Federal law there reigns supreme.

b. Feedback Between the Doctrines

*Erie* ideas thus help to make sense of reverse-*Erie*. In state court, the balancing methodology smooths, while it explains, the outer reaches of preemption. On the one hand, in the setting that involves a matter more of inference by judge than of implication by statute, when state law would merely frustrate federal law, those *Erie* ideas provide refinement of how obstacle and field preemption should work: whenever federal interests outweigh state interests in an *Erie* sense, there should be preemption. On the other hand, as one goes even farther into more independent judicial choice of law under reverse-*Erie*, the direct application of *Erie* ideas becomes easier and easier to justify. There is, consequently, no real problem in adding *Erie* ideas to preemption in this setting.

Conversely, there is no real problem with injecting preemption ideas into traditional *Erie* theory. A few commentators acknowledge the obvious fact that preemption analysis constitutes part of the *Erie* doctrine in federal court too.\(^{181}\) Direct collisions between pertinent federal law and state law will result in preemption of the state law in federal court. In fact, *Erie*’s judicial choice-of-law methodology actually works only as a backup to preemption. Consider *Hanna* as an example. Its analysis is reassuringly similar to the reverse-*Erie* scheme. The initial *Hanna* question is whether the state law directly collides

\(^{180}\) See, e.g., Silberman et al., supra note 156, at 111 ("Some teachers find objectionable the phrase ‘reverse *Erie*,’ as the doctrine has little to do with the federalism concerns animating *Erie* and its progeny. Rather, the doctrine is a corollary of the Supremacy Clause: it is sometimes necessary to force state courts to adopt federal procedures in order to give effect to a federal substantive right.").

with a Federal Rule: if so, the Federal Rule governs; if not, the judicial choice-of-law methodology steps in as a backup. 182 That is to say, in both the Hanna and the reverse-Erie settings, in federal court and state court respectively, a direct collision of federal and state law effectively results in preemption of the state law, but otherwise an accommodation of federal and state interests is necessary to determine applicable law.

The bottom line is that reverse-Erie and Erie each entail the same methodology of preemption as well as the same methodology of judicial choice of law. Their dual methodologies are the same, even if the resulting reaches of federal and state laws differ because of the asymmetrical effect of the Supremacy Clause in the operation of the preemption doctrine. Assuming that the Constitution, Congress, or binding precedent has not explicitly foreclosed the question of applicable law, the federal court and the state court alike must determine if federal law preempts state law. Outside the reach of preemption, the federal court and the state court alike must make a choice of law in light of competing federal and state interests.

3. Soothing Summary of Erie and Reverse-Erie

This, then, is the reverse-Erie doctrine: federal law—be it constitutional, statutory, or common law—will apply pursuant to the Supremacy Clause in state court, subject to the Constitution or Congress having already chosen the applicable law, whenever it preempts state law or whenever it prevails by an Erie-like judicial choice of law.

This summary is not some wishfully radical proposal. Instead, its aim is an accurate statement of the current law. If the state and federal laws directly collide, then the federal law preempts; if not, and only if not, then the state courts must perform the federally mandated accommodation of interests to choose the applicable law. That is, preemption and judicial choice of law are alternative routes to the supremacy of federal law, not alternative routes to the application of state law. If federal law applies, say, by express preemption, the courts are not to second-guess the congressional dictate by some sort of judicial balancing. Only in the realm beyond preemption does judicial choice of law have an independent role. In the middle zone of obstacle and field preemption, the accommodation of federal and state interests helps to concretize preemption: recall that whenever federal

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interests overcome state interests in an *Erie* sense, there should be such preemption. A benefit of this insight is to alleviate the difficulty of preemption’s obscure bounds. The increasing attention to accommodation of federal and state interests in that middle zone moots the precise location of the outer boundary of preemption, as that boundary becomes an imperceptibly transitional zone in the middle of the broad subject of reverse-*Erie*.

Once preemption and judicial choice of law thus find their adjacent places, the reverse-*Erie* and *Erie* doctrines become amenable to productive comparison. Both doctrines involve determining the appropriate reach of state and federal laws. For each institutional player, answering any such hitherto undecided choice-of-law question should entail a consciousness of federal supremacy but often also some sort of accommodation of interests. Thus, the two doctrines share a basic similarity. They deserve to be studied together. They should generate comparable intensities of debate, although they have not.

Upon study, the *Erie* and reverse-*Erie* doctrines ultimately form a logical and arguably optimal pattern, just as Judge Friendly suggested, with state law applying throughout our system where it ought to apply and with federal law applying where it should apply to federal and state players. To summarize the big picture of our legal system, in areas of clear state “substantive” concern, state law governs in both state and federal courts. As one moves into “procedural” areas, state law tends to govern in state court and federal law tends to govern in federal court, but not always. Finally, as one moves into areas of clear federal “substantive” concern, federal law governs in both state and federal courts. The patterns of answers from *Erie* and reverse-*Erie* are not all that different, and both dissimilarities and similarities are explicable and instructive.

Reverse-*Erie*, including preemption and judicial choice of law, and *Erie*, including federal common law and other subdoctrines, in fact turn out to be facets of the same problem. Resolving this overarching problem of the relationship between state and federal law requires a simultaneous consideration of the implications of these two interlocking doctrines, a complicated process that nicely reflects the complications of federalism itself.

183 *See supra* text accompanying note 162.
II. Significance

A. Significance to the Country

The foregoing few pages' summary of the big picture rightly implies that the subject here is extraordinarily important. But it was a long road to that brief summary. Accordingly, the importance of reverse-Erie, and sometimes even of Erie itself, is initially a bit mysterious to people.

Additionally, most of the major Erie cases involve only a judicial application of quasi-procedural state law in federal diversity cases. Consequently, some people seem to view this subject as technical or simply arcane. Others have characterized this view thus:

*Erie* has no meaning for cases outside diversity jurisdiction. *Erie* reflects the principle that the federal courts have an obligation to apply state law whenever their sole reason for hearing a dispute is to provide a fair and impartial forum. Accordingly, the rule in *Erie* is confined to diversity cases, where the only federal interest is in providing a forum free of interstate bias, and perhaps to certain ancillary and pendent claims, which the federal courts have no independent interest in resolving and which are heard solely because of their connection with federal claims.

Such a view could not be more wrong. Those leading cases are the tail of a humongous dog. We study mainly those tough major cases because they arose where the battle was waged—the difficult quasi-procedural issues in diversity when the higher lawmakers have been silent—but the rationale of those cases controls in the infinitude of more obvious cases.

Therefore, the same choice-of-law problem arises not only in diversity cases but in all other federal cases, as represented by the bottom row of my figure below. It also arises in all state cases. This commonality is what this Article was about, and it explains how I could say that reverse-Erie and Erie are facets of the same problem.

But that encapsulation makes vertical choice of law sound like a problem only for the judiciary. Instead, it arises in all matters of law-making faced by the legislature and the executive, as well as by their administrative agencies, as the next row of my figure tries to represent. Indeed, this problem was the main concern of the Framers.

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185 Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich. L. Rev. 311, 313 & n.9 (1980) (citing various sources as "representative statements" of this view).
in their task of creating a federal system by the Constitution, which is after all a choice-of-law document. The government still performs this task of allocating between state and federal law in its ordinary making of law. If the Constitution made the choice between state and federal law, its choice is binding. If it did not choose, then Congress, subject to existing constitutional constraints, can make the binding choice. Only if the Constitution and Congress (and its authorized delegates) have not chosen, then the federal and state courts, as junior partners in this endeavor, get to make the choice, acting by a judicially developed choice-of-law methodology that today operates well inside the outer constitutional constraints and so can reflect the optimal relationship of state and federal law.

In turn, that description makes vertical choice of law sound like solely a lawmaking problem of the government. Instead, our legal system imposes on all officials—and indeed on all persons living under it and trying to apply the law, whether as lawyers or as other citizens—the problem of divining whether the government allocated a matter
to state or federal law. So, these law-applying actors too must appear in any figure representing the whole picture of reverse-\textit{Erie} and \textit{Erie}.

In sum, the simple fact is that every question of law posed to every actor in a federal system such as ours is preceded by the choice-of-law problem of whether the legal question is a matter of state or federal law. "Every question of law" means all tasks of making or applying law by every actor. "Every actor" means all public or private institutions and persons—the private person in private affairs, the policeman on the beat, the judge, the rulemaker, the legislator, the Framers. They all must precede every legal decision or act with a choice-of-law process, that is, by first deciding whether federal or state law should govern. If a car driver or a police officer is trying to determine the speed limit, that law-applier needs first to resolve whether state or federal law governs by determining the choice that the Constitution, Congress, or courts have made or would make. Most often, in fact almost always, the choice-of-law problem is very easy in light of a gross imbalance of competing interests, and so it has an intuitively clear answer. Rarely, closer to the dividing line between state and federal law, the resolution can be exquisitely difficult. The same goes for lawmakers, although here too somebody higher in the hierarchy probably has already made the choice. Of course, the same goes for courts when applying or making law, although the difficult cases will be much more numerous and prominent for them, as demonstrated by their endless attention to the \textit{Erie} doctrine over the years. In all events, the choice-of-law problem is literally ubiquitous: the first step in any legal act in our federal system is a vertical choice of law.\textsuperscript{186}

Parenthetically, the way all these lawmakers and appliers should make this choice is, in my own view, not by some bizarrely cramped test such as the bare "twin-aims test" that some see in Hanna, but by a broad balancing of state interests versus federal interests (including outcome-determinativeness). Balancing is how the Framers decided to add the Seventh Amendment, that is how Congress enacted Federal Rule of Evidence 501, that is how the rulemakers adopted Federal Rule of Civil Procedure 15(c), that is how the Court decided and . It is also how they have decided substantive matters. When the Constitution authorized our currency system, when Congress determined the reach of the securities law, or when the Court decided matters of intrastate waters, it balanced state and federal interests. Some sort of balancing, on ques-


But scholars have given little or no attention to the lessons that the Erie megadoc trine holds for foreign federal systems, even though it embodies the ultimate mechanism for actually implementing federalism. The main reason for so ignoring Erie is that the comparative federalism work has proceeded from a constitutional law or political science perspective, which perspectives have long ignored Erie by leaving it to civil procedure and federal courts scholars. The inattention is probably also owing to the facts, first, that parallel hierarchies of state and federal courts, which would make Erie's relevance obvious, are not the norm elsewhere and, second, that foreign courts have not yet theorized their problem as one of vertical choice of law or realized that the problem is literally ubiquitous within any federal system. In particular, because the European Union lacks lower "federal" courts, traditional Erie doctrine seems irrelevant at first glance; but reverse-Erie should eventually prove instructive as the authorities continue to struggle with the choice between E.U. law and national law, especially on quasi-procedural issues such as time limits on which the national procedural law would tend to undercut E.U. substantive law. See Koen Lenaerts, Dirk Arts & Ignace Maselis, Procedural Law of the European Union 83-85, 92-94 (2d ed. 2006).

See, e.g., Ely, supra note 58, at 707-18. Among its many shortcomings, the twin-aims Erie test provides no handle on how to answer a reverse-Erie question.

See Lipkin, supra note 56, at 97, 164-65 (describing "federalism as balance," and arguing for its specification).

187 See, e.g., supra note 58, at 707-18. Among its many shortcomings, the twin-aims Erie test provides no handle on how to answer a reverse-Erie question.

188 See Lipkin, supra note 56, at 97, 164-65 (describing "federalism as balance," and arguing for its specification).

189 U.S. CONST. amend. VII.

190 Fed. R. Evid. 501.


194 U.S. Const. art. I, § 8, cl. 5.


196 E.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
tions of first impression, represents the path to the solution of this fundamental and universal threshold question of federalism.

Whether or not the reader agrees as to all methodological details, we should by now be in agreement that the subject under study is far from technical or arcane: it is the key to understanding federalism and hence our governmental and legal system. A megadoctrine, which shares the *Erie* name, treats this ubiquitous and profound issue of the division between state and federal domains. Reverse-*Erie* interlocks with the *Erie* case and ultimately merges into the overall *Erie* megadoctrine to form a logical and arguably optimal pattern.

**B. Insignificance in the Curriculum**

1. Civil Procedure Courses

No doubt about it, the federalizing revolution in the content of civil procedure courses is complete on the *Erie* front. All eighteen current civil procedure casebooks cover *Erie*, devoting an average of sixty-three pages to it, although their coverage does vary from single to triple digits.

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The civil procedure casebooks' coverage of *Erie* is analyzed by Robert J. Condlin, "A Formstone of Our Federalism": *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U.
In stark contrast, their express and thematic coverage of reverse-
Erie is minimal. Seven casebooks do not really touch the doctrine.
Three others just mention it very briefly, not getting past the rule that
state courts might have to follow some federal procedure when hear-
ing federal-law claims. Three more casebooks go beyond bare men-
tion to treat the doctrine lightly, mostly limiting their coverage to that
same rule.

Only the remaining five of the eighteen civil procedure
casebooks treat reverse-Erie at all seriously. Nevertheless, each of
these covers the subject in under ten pages.

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199 FREER & PERDUE, supra note 198, at 650 (“State courts must follow federal pro-
cedures ‘essential to effectuate’ the purposes behind the federal law.” (quoting Dice
note 198, at 615 (“To put the point more broadly if not with high precision, state
procedure can govern so long as it does not unduly burden the federal right—but if it
does, state courts hearing federal-law claims must follow federal procedure.” (citing
Dice)); SILBERMAN ET AL., supra note 198, at 572–73 (discussing Felder after observing
that “there are occasions when use of state procedure does not adequately vindicate
the federal right”).

200 FRIEDMAN ET AL., supra note 198, at 287–89 (describing Dice, Felder, and Johnson
before concluding that “[t]he combination of these three cases suggests that where a
state procedural rule neither burdens nor frustrates the attainment of the federal
statute’s policies and objectives, and is not outcome determinative, the plaintiff who
chooses to enforce her federal claim in state court takes the state courts as she finds
them”); IDES & MAY, supra note 198, at 442, 522–25 (describing Dice and Felder after
saying that reverse-Erie analysis is much simplified compared to Erie because “[i]f state
procedural law actually conflicts with applicable and valid federal law, the state law
must give way”); PARNESS, supra note 198, at 337–38 (using the release-of-claim part of
Dice as a teaching case, and not reaching the “state procedures” problem).

201 FIELD ET AL., supra note 128, at 387–95 (using Hinderlider v. La Plata River &
Cherry Creek Ditch Co., 304 U.S. 92 (1938); Dice, Brown; Norfolk & W. Ry. v. Liepelt,
444 U.S. 490 (1980); and Felder as teaching cases); FRIEDENTHAL ET AL., supra note 198,
at 443–49 (using Dice); HAZARD ET AL., supra note 198, at 522–28 (using Dice); MARCUS
ET AL., supra note 3, at 997–1005 (using Dice); TEPLY ET AL., supra note 198, at 536–44
It seems as if *Erie* and reverse-*Erie* should be either both in or both out of any civil procedure course. We teachers are not looking at *Erie* just to see how to litigate in federal courts or how the federal side of the system works. The aim today is to introduce the students to the system of federalism, which includes two sides of a complex federal-state relationship. Therefore, I would think that the modern civil procedure course should cover both *Erie* and reverse-*Erie*.

2. Federal Courts Courses

Nonetheless, most civil procedure casebooks are willing to leave reverse-*Erie* to the federal courts course. Unfortunately, most federal courts casebooks turn out not to view that doctrine as a real concern. Again, all eight current federal courts casebooks cover *Erie*, treating it in greater depth by devoting about twice as many pages as do civil procedure casebooks. But one cannot rely on federal courts casebooks to treat reverse-*Erie* with any seriousness.

Why not? Most of the federal courts casebooks naturally aim their focus on federal courts and hence not on state courts, which is consistent with the national law schools' usual ignoring of state courts,

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(using Johnson). Representatively, Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Herskoff, *Teacher's Manual to Accompany Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Herskoff, Civil Procedure* 98 (9th ed. 2005), remarks: "Although some might consider this topic to be outside the first-year curriculum, we find it important to include some discussion of *Erie* and the Supremacy Clause concerns that this subject raises."


Incidentally, when federal courts casebooks mention or treat reverse-*Erie*, they usually do not do so as part of their *Erie* coverage. So the pages given above for *Erie* coverage do not include any real reverse-*Erie* coverage.
but which would be hard to explain if the books were seeking to relieve the students' ignorance of federalism. A closer look at the books' structures suggests that they, perhaps assuming that civil procedure and constitutional law courses have provided an adequate introduction to the federal-state relationship, have other fish to fry. The books' sketchy coverage of reverse-Erie typically comes not as part of their Erie treatment but instead as part of their treatment of congressional power to control the courts. Specifically, reverse-Erie appears as an addendum to the doctrine of Testa\textsuperscript{205} and Howlett,\textsuperscript{206} which deals with the states' duty to entertain federal causes of action in the absence of a valid excuse.\textsuperscript{207} Moreover, all the books skip preemption in the main, leaving it to constitutional law courses. This pattern in the books' coverage suggests that reverse-Erie is sneaking in as an attenuated aspect of separation of powers, rather than as a prominent feature of federalism.\textsuperscript{208}

Consequently, three of the federal courts casebooks do not even touch the topic of reverse-Erie, except implicitly through brief treatment of the Testa-Howlett doctrine.\textsuperscript{209} Four of the remaining five do give actual attention to the reverse-Erie topic while maintaining a primary focus on Testa-Howlett, and some of them also give additional mention to reverse-Erie where it arises incidentally in particular topics such as civil rights actions or adequate state grounds.\textsuperscript{210}

\begin{footnotes}
\footnotetext{205}{Testa v. Katt, 330 U.S. 386 (1947).}
\footnotetext{206}{Howlett v. Rose, 496 U.S. 356 (1990).}
\footnotetext{207}{Several commentators also approach reverse-Erie from the Testa-Howlett premise. See, e.g., Drahozl. supra note 15, at 81-86. But cf. 16B Wright et al., supra note 125, § 4023 (exhibiting another but more complicated perspective, which entails approaching the subject from the vantage of the adequate-and-independent-state-grounds limitation on Supreme Court review); Meltzer, supra note 29, at 1137-45 (same).}
\footnotetext{208}{See Mary Brigid McManamon, Challenging the Hart and Wechsler Paradigm, 27 Conn. L. Rev. 833 (1995) (book review) (discussing purposes of federal courts casebooks).}
\footnotetext{209}{Doernberg et al., supra note 204, at 172, 582; Fink et al., supra note 204, at 243-51; Wright & Oakley, supra note 204, at 485-91.}
\footnotetext{210}{Clinton et al., supra note 204, at 277-95, 901-06, 1385; Hart & Wechsler, supra note 74, at 443-65, 564-65, 764-65; Hellman & Robel, supra note 204, at 195-222; Redish & Sherry, supra note 204, at 287-301, 983. Indeed, their actual coverage of reverse-Erie, stricto sensu separate from Howlett-Testa, is not much lengthier than that of the thorough civil procedure books. Clinton et al., supra note 204, at...}
\end{footnotes}
Only one federal courts casebook, it being the only one that includes the word "state" in its title, tries to integrate reverse-Erie with its Erie coverage. It does so in the book's opening chapter, which is entitled "Choice of Law in the Federal System."211

C. Explaining the Misperceptions

Even the relevant treatises slight the subject of reverse-Erie, for similar reasons.212 Most commentators see this subject as a relatively

293–95; Hart & Wechsler, supra note 74, at 453–65 (using Dice as a teaching case); Hellman & Robel, supra note 204, at 208–22 (using Johnson); Redish & Sherry, supra note 204, at 294–301 (using Dice).

211 Low & Jeffries, supra note 117, at 32–65 (including coverage of reverse-Erie, id. at 52–65 (using Johnson as a teaching case)). It is interesting to note that this book originally appended reverse-Erie to Testa in a chapter on “Constitutional Limits on Congressional Allocation of Jurisdiction,” just as other federal courts books do. Peter W. Low & John Calvin Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 248–63 (1987) (using Dice as a teaching case). While this book’s evolution is desirable in my view, the book’s origin may explain its narrow view of reverse-Erie’s reach. See Low & Jeffries, supra note 117, at 57 (entitling its coverage as “Notes on the Occasional Duty of State Courts to Apply Federal Procedures”).

212 The federal courts treatises slight the subject, although they certainly do not speak with one voice while doing so. Chemerinsky, supra note 13, § 3.5 (giving good attention to Testa-Howlett in section entitled “Congressional Power to Have State Courts Decide Federal Law Matters,” but only slightly more than a page to reverse-Erie before concluding that federal law has a small role whereby state courts must follow federal procedures “if Congress specifies the procedure for a particular matter” or “if the application of state procedures would be ‘outcome determinative’ or significantly ‘burden the exercise of federal rights’”); 17A Linda S. Mullenix, Moore’s Federal Practice §§ 120.30, .62 (3d ed. 2006) (addressing applicability of federal law in state court briefly before concluding that federal law supplants state procedural law only when the latter would “effectively deny substantial rights under federal law”); Linda Mullenix, Martin Redish & Georgene Vairo, Understanding Federal Courts and Jurisdiction § 15.25 (1998) (same, being adapted from Moore’s Federal Practice); Pfander, supra note 134, § 6.5 (saying in brief section entitled “The Converse-Erie Problem” that the Supreme Court has provided little guidance but that the problem is very similar to the Erie problem itself); Martin H. Redish, Federal Jurisdiction (2d ed. 1990) (not treating reverse-Erie); Wright & Kane, supra note 6, § 45 (giving good attention to Testa-Howlett in section entitled “State Enforcement of Federal Law,” but only two pages to reverse-Erie despite concluding such an extensive role for federal law that state procedure’s role becomes “de minimis”); id. § 107 (also mentioning Brown in relation to adequate-state-grounds doctrine); 16B Wright et al., supra note 125, § 4023, at 344, 358 (recounting many instances of federal law imposed on state courts in section entitled “Independent and Adequate State Ground—Procedural Grounds—The Independence of State Procedure,” but resisting analogy to Erie because the purposes of federal jurisdiction to enforce state rights “need not be the same as the purposes of permitting and often requiring state courts to enforce federal rights” and thus leaving the subject as “a confused picture”); Larry W. Yackle, Fed-
unimportant appendage to preemption or some other doctrine, an appendage that in the end requires little application of nonsubstan-
tive federal law in state court. But if a fraction of the remaining comment-
ators view reverse-Erie as a significant doctrine, if a few see it as a
more-or-less independent doctrine rather than as an appendage to
some other doctrine, if some see it as a more intrusive doctrine than
Erie while others view it as a less intrusive doctrine, then something is
wrong in the condition of commentary.

Commentators' development of any legal doctrine can be surpris-
ingly contingent. A subject may remain remarkably undeveloped if it
falls into a curricular gap. An example would be the collateral bar
rule, an important doctrine of which many lawyers and professors are
ignorant, because it is not quite civil procedure and not quite consti-
tutional law, managing only to squeeze into some remedies courses.213

213 The collateral bar rule authorizes punishment by criminal contempt for the
violation of a court order even though that order is judicially determined to have
been improper (no matter how serious the error, even for lack of subject matter juris-
diction or constitutional violation), although this doctrine authorizes such punish-
ment only if the violator was personally bound and had an opportunity to pursue full
review of the order without incurring destruction of a significant right in question.
See generally John R.B. Palmer, Collateral Bar and Contempt: Challenging a Court Order
After Disobeying It, 88 CORNELL L. REV. 215 (2002) (explaining the collateral bar rule

Constitutional law treatises likewise tend to ignore reverse-Erie as a judicial
choice-of-law process, and so leave it to civil procedure and federal courts scholars,
see, e.g., Chester James Antieau & William J. Rich, Modern Constitutional Law
(2d ed. 1997) (three volumes); Chemerinsky, supra note 15; Ronald D. Rotunda &
John E. Nowak, Treatise on Constitutional Law (3d ed. 1999) (five volumes), but
does not always, as shown by the latest rendition of 1 Laurence H. Tribe, American Con-
stitutional Law § 3-7, at 321 n.61; id. § 6-38, at 1275–77 (3d ed. 2000) (discussing
especially the implications of Felder).
For reverse-Erie, civil procedure courses tend to leave it to federal courts, a course whose interests actually take its coverage off in a different direction. Compounding the problem, civil procedure tends even more predominantly to leave preemption to constitutional law, a course that at least until recently left preemption as one of its lesser-worked topics.

Moreover, the guise of any doctrine depends on the viewer's point of departure from some established topic. It seems that scholars and suggesting how lower courts should interpret existing Supreme Court precedent).


In fact, all law courses entail the Erie megadoctrine, but most do not focus on it. Consider criminal law. Considerable federal procedural law applies in state criminal cases, and some state law applies in federal criminal cases. Compare, e.g., Arizona v. Manypenny, 451 U.S. 232, 250 (1981) (applying state appeal law in removed state criminal case against federal officer), with, e.g., City of Aurora v. Erwin, 706 F.2d 295, 300 & n.10 (10th Cir. 1983) (applying incidents of federal jury procedure in a removed criminal case). See generally Wayne A. Logan, Creating a Hydra in Government: Federal Recourse to State Law in Crime Fighting, 86 B.U. L. Rev. 65 (2006) (discussing the interrelation between state and federal criminal law). But because these occurrences are either obvious or rare, and because state and federal subject matter jurisdictions do not usually overlap in the sense of one sovereign’s prosecuting crimes under the other’s laws, criminal law courses and scholars can afford to neglect Erie. They cannot afford, however, to deny its relevance, as the court did in United States v. Powers, 482 F.2d 941, 943 (8th Cir. 1973) (“Erie has no application whatsoever to federal criminal prosecutions.”).

Cf. Stephen A. Gardbaum, The Nature of Preemption, 79 Cornell L. Rev. 767, 768 (1994) (“Although as a topic, preemption has largely been ignored by constitutional law scholars, it is almost certainly the most frequently used doctrine of constitutional law in practice.”) (footnotes omitted)).
who take a narrow view of reverse-Erie come at it from certain angles. For federal courts scholars, the usual jumping-off point for approaching reverse-Erie is Testa-Howlett.\textsuperscript{216} This narrow focus on congressional control of court access would tend to produce a pinched view of reverse-Erie. For constitutional law scholars, the usual jumping-off point is preemption.\textsuperscript{217} They consequently tend to think primarily of the relatively restrained preemption of state substantive law by congressional statute, and their myopia works to obscure that reverse-Erie can be more intrusive than Erie.

In sum, reverse-Erie is on the radar screen of relatively few scholars. Of them, not enough use Erie as the departure point. Moreover, virtually no law-school course combines study of reverse-Erie with preemption. Thus, scholars and teachers tend not to observe, no less explain, why reverse-Erie is in a sense more intrusive than Erie. Nor do they tend to perceive that reverse-Erie is the critical missing piece in the big puzzle of the relationship between state and federal law. All this appears to constitute the best, albeit unsatisfying, explanation of its neglect.

**Conclusion**

The simple truth is that every question of law posed to every actor in a system of federalism is preceded by the choice-of-law problem of whether the legal question is a matter of state or federal law, a problem whose resolution is usually obvious but sometimes excruciatingly difficult.

This ubiquitous truth prevails in state court. The sorely neglected doctrine of reverse-Erie provides that federal law—be it constitutional, statutory, or common law—will apply pursuant to the Supremacy Clause in state court, subject to the Constitution or Congress having already chosen the applicable law, whenever that federal

\textsuperscript{216} See supra note 207 and accompanying text. Such views may influence certain civil procedure books too. See, e.g., John J. Cound, Jack H. Fiedenthal, Arthur R. Miller & John E. Sexton, Civil Procedure 455–62 (8th ed. 2001) (using Testa as well as Dice as teaching cases); cf. Fiedenthal et al., supra note 198 (omitting Testa in that casebook’s most recent edition).

\textsuperscript{217} See supra note 13 and accompanying text. For example, even though Professor Chemerinsky provides an excellent discussion of preemption in his constitutional law treatise, Chemerinsky, supra note 15, § 5.2, he makes no mention of reverse-Erie there. When he reaches the latter subject in his federal courts treatise, Chemerinsky, supra note 13, § 3.5, his constitutional law interest influences the narrow scope he gives to reverse-Erie. Such views may influence certain civil procedure books too. See, e.g., Silberman & Stein, supra note 156, at 111–12 (going from preemption approach to narrow view of reverse-Erie).
law preempts state law or, as less frequently acknowledged, prevails by an
\textit{Erie}-like judicial balancing. If the state and federal laws directly
collide, then the federal law preempts; if not, then the state courts
must perform the federally mandated balancing of governmental in-
terests to determine the applicable law.

This understanding of reverse-\textit{Erie} constitutes a heretofore miss-
ing but significant piece of the pervasive and puzzling problem of ver-
tical choice of law. Fitting it with all of the other pieces of the puzzle
helps to reveal the true relationship between state and federal law. It
interlocks with and ultimately merges into the overall \textit{Erie} scheme to
form a logical pattern, in which not only the state and federal courts
but also all the other institutional and private actors can weigh state
and federal interests to shape or implement the optimal relationship
of state and federal law in our legal life.