THE DOCTRINE IN THE SHADOWS: REVERSE-*ERIE*, ITS CASES, ITS THEORIES, AND ITS FUTURE WITH PLAUSIBILITY PLEADING IN ALASKA

*Philip A. Tarpley**

ABSTRACT

In 2007 and 2009, respectively, the United States Supreme Court decided Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*, abrogated* Conley v. Gibson's *notice pleading standard, and imposed a new plausibility pleading standard upon the federal court system. Alaska, along with a majority of states however, still retains* Conley's *"no set of facts" notice pleading standard. This Note asks, in light of the difference between the federal and Alaska pleading standards, whether Alaska – or any state – could be forced to apply the federal pleading standard when it adjudicates federal substantive claims. Prior to* Iqbal*, a plaintiff in Alaska would have faced the same pleading obligations in state and federal court regardless of whether he pleaded a state or federal claim. As this Note describes, now, a plaintiff could face different pleading standards depending on not only where he brings his claim, but also, if he's in state court, whether he brings a state or federal claim. The reason for this is the Reverse-*Erie *doctrine: an little-developed judicial choice of law theory that broadly asks which procedure, federal or state, applies in a state court proceeding. Using the differences between federal and state pleading standards as an opportunity to flesh out Reverse-*Erie*, this Note concludes that while it is unlikely that the Supreme Court would force a state to adopt the federal pleading standard, the jurisprudential framework for such a move exists.*

---

* J.D., Duke University School of Law, 2015; B.A., Political Science, Rice University, 2012. Many thanks to the staff of the *Alaska Law Review*, in particular the Executive Editor overseeing this Note, Logan Mohs. The views expressed herein and any errors remain the author's own.

INTRODUCTION

On November 18, 1957, the United States Supreme Court handed down *Conley v. Gibson*[1] and ushered in an era of notice pleading. Though initially only federal in application, *Conley*'s interpretation of Federal Rule of Civil Procedure 8(a)(2) soon swept across the nation. Throughout the next half-century, state after state adopted *Conley*'s liberalized notice pleading standard. In 1940, Arizona's Supreme Court adopted the Federal Rules verbatim, making Arizona the first federal replica state—"that is, a state with a procedural system modeled after the Federal Rules."[2] In 1959, the Alaska Supreme Court adopted its own set of procedural rules modeled after the Federal Rules.[3] In 1967, that court adopted *Conley*'s interpretation of Rule 8(a)(2) and incorporated the federal notice pleading standard.[4] By 1975, twenty-one other states had followed Arizona's and Alaska's examples and become federal replica states.[5] By 2007, fifty years after *Conley* was decided, twenty-six states and the District of Columbia had altered their procedural rules to resemble the Federal Rules.[6]

On May 21, 2007 and May 18, 2009, respectively, the United States Supreme Court decided *Bell Atlantic Corp. v. Twombly*[7] and *Ashcroft v. Iqbal*,[8] abrogating *Conley*'s notice pleading standard and imposing a new plausibility pleading standard upon the federal courts.[9] These decisions shook the foundation for those states, like Alaska, that had adopted the federal pleading rule using the *Conley* standard. After *Twombly* and *Iqbal*, state courts had to decide whether to follow the Supreme Court and change from notice to plausibility pleading or stick to the *Conley* "no set

1. 355 U.S. 41 (1957), *abrogated by* Bell Atl. Co. v. Twombly, 550 U.S. 544 (2007).

2. Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1437 (2008).

3. *See 2014-15 Alaska Rules of Civil Procedure*, ALASKA COURT SYS., http://www.courts.alaska.gov/rules/civ2.htm (last visited Apr. 1, 2015) (showing that most of the rules were "adopted by [Supreme Court Order] 5 October 9, 1959").

4. Shannon v. Anchorage, 429 P.2d 17, 19 (Alaska 1967). *See id.* at 21 (Rabinowitz, J., concurring) (citing *Conley*, 355 U.S. at 45–46) ("Adopting this last mentioned line of authorities, and treating the matter as a motion for summary judgment, I am of the opinion that it does not appear 'beyond doubt' that appellant could prove 'no set of facts in support of his claim which would entitle him to relief.").

5. John B. Oakley, *A Fresh Look at the Federal Rules in State Court*, 3 NEV. L.J. 354, 356–58 (2003).

6. *Twombly*, 550 U.S. at 578 (Stevens, J., dissenting).

7. 550 U.S. 544 (2007).

8. 556 U.S. 662 (2009).

9. *Id.* at 678.

of facts" standard. This question was especially daunting for states, like Alaska, that had functioned under *Conley*'s pleading standard for decades.

Two recent state supreme court decisions have thrown this question into the forefront of civil procedure discussions. In 2010, the Washington Supreme Court handed down *McCurry v. Chevy Chase Bank, FSB*[10] and became the first state supreme court to reject the new plausibility pleading standard.[11] One year later, the Tennessee Supreme Court joined Washington when it decided *Webb v. Nashville Area Habitat for Humanity, Inc*.[12] As time draws on, more states will be forced to answer this question for themselves. Alaska will certainly be faced with this decision. Though a replica state, the Alaska court system has yet to address *Twombly* and *Iqbal*. As it stands today, Alaska courts still apply *Conley*'s notice pleading requirement to the federal and state claims that pass in front of them.[13]

This issue has substantial implications for all stages of litigation. "Pleading comes early in the life cycle of a case, shapes litigation strategy, reveals valuable information to the opposing party (that can be used to encourage settlements), and is the gateway to all subsequent procedural devices."[14] For pro se litigants in particular, pleading is their first exposure to the court system. The accessibility of the court system can dramatically affect both the outcome of the litigant's case and their willingness to file a claim. And, unlike certain procedures that only affect particular cases, pleading standards affect *every* case brought in court. In Alaska, that means over 150,000 cases annually.[15]

In light of *Twombly* and *Iqbal*, this Note intends to answer the question of which procedure—federal or state—must apply in an Alaska state court adjudication of a federal substantive claim when Congress, the Constitution, and the Courts have remained silent on this issue. The consequences of this question's answer are crucial to discussions of the federal/state balance of power. The jurisprudential doctrine at work, Reverse-*Erie*,[16] is little known, rarely documented, and relatively

10. 233 P.3d 861 (Wash. 2010).
11. *Id*. at 863.
12. 346 S.W.3d 422 (Tenn. 2011).
13. *See, e.g.*, *Ex rel*. Mickelsen v. North-Wend Foods, Inc., 274 P.3d 1193, 1197 (Alaska 2012) (applying the *Conley* standard).
14. Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 111 (2010).
15. *Alaska Court System Annual Report FY 2013*, ALASKA COURT SYS. 71 (2014), http://www.courts.alaska.gov/reports/annualrep-fy13.pdf.
16. This doctrine is also known as "Converse-*Erie*" or "Inverse-*Erie*." Joseph R. Oliveri, *Converse-Erie, The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372, 1373 (2008); Gregory Gelfand & Howard B.

obscure. As Justice O'Connor commented in 1988, "the implications of this 'reverse-*Erie*' theory [are not] quite clear."[17] Her comment is an understatement. Most of the legal scholarship to touch upon the subject has done so only briefly and in minor detail.[18] This Note attempts to change that. Here, each of the notable Reverse-*Erie* cases and the theories they demonstrate will be put on full display.

Ultimately, the answer to the question of which procedural law—federal or state—must apply in state court is unclear. Though it is unlikely that the Supreme Court will ever force the heightened plausibility pleading standard onto the states that have not adopted it, the jurisprudential framework exists for such a move to be made. Consequently, the Alaska Supreme Court, and all of the courts in states that still apply *Conley*, should keep their ears to the ground on this matter.

The advent of plausibility pleading and the question it poses to state courts, however, presents an opportunity for constitutional law scholars to more clearly understand Reverse-*Erie*. For the last century, the Reverse-*Erie* doctrine has hidden in the shadows of *Erie* itself, as well as federalism, pre-emption, and other monolithic constitutional doctrines. Now, as states start to assert their own local procedural dominance, Reverse-*Erie* has a chance to stand in the light of day. Most importantly, this situation may eventually provide the Supreme Court with an opportunity to apply Reverse-*Erie* to an essential aspect of civil procedure that touches every case across the nation: pleading standards.

Part I of this Note introduces and explains the current pleading situation. Part II explains the fundamental question of the Note. Part III delves into the Reverse-*Erie* doctrine, explaining the theories it represents, the cases that develop those theories, and the current state of Reverse-*Erie* jurisprudence. Part IV builds off of the information in Parts I–III to answer the question of which procedure—federal or state—must apply in an Alaska state court adjudication of a federal substantive claim.

I. THE CURRENT PLEADING SITUATION

A. The Federal Pleading Standard—*Conley*, *Twombly*, and *Iqbal*

In 1934, Congress passed the Rules Enabling Act (REA)[19] and

Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 941 n.76 (1988).

17. Felder v. Casey, 487 U.S. 131, 161 (1988) (O'Connor, J., dissenting).
18. *See infra* notes 69–80.
19. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28

opened the door to a new era of civil procedure in the United States. Four years later, under the authority granted to it in the REA, the Supreme Court adopted the Federal Rules of Civil Procedure (FRCP), a set of procedural rules that govern federal courts across the nation.[20] The FRCP fundamentally "reshaped civil procedure."[21] Today, the passage of the FRCP is largely understood as "the single most substantial procedural reform in U.S. history."[22]

Among its many significant changes, the FRCP included a pleading requirement in Rule 8. Under Rule 8(a)(2), all that is needed to sufficiently construct a federal claim is "a short and plain statement of the claim showing that the pleader is entitled to relief."[23] Rule 8 becomes important when the sufficiency of the plaintiff's pleadings is called into question. If a defendant files a motion to dismiss "for failure to state a claim upon which relief can be granted"[24] under Rule 12(b)(6), for example, the court must determine the sufficiency of the plaintiff's pleadings.

The Court has interpreted and explained Rule 8(a)(2) in response to 12(b)(6) motions to dismiss. In *Conley v. Gibson*,[25] the Court adopted a notice pleading standard. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[26] Rather, a complaint simply must contain enough information to provide notice of the crux of the claim. Under *Conley*, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[27] For the rest of the twentieth century, *Conley's* "no set of facts" language "became a cornerstone of federal civil procedure."[28] But this era of notice pleading—an era the Court had rigorously protected[29]—did not last.

U.S.C. § 2072 (2012)).

20. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 232–33 (1998).

21. *Id.* at 233.

22. *Id.* at 248.

23. FED. R. CIV. P. 8(a)(2).

24. FED. R. CIV. P. 12(b)(6).

25. 355 U.S. 41 (1957), *abrogated by* Bell Atl. Co. v. Twombly, 550 U.S. 544 (2007).

26. *Id.* at 47.

27. *Id.* at 45–46 (emphasis added).

28. Michalski, *supra* note 14, at 115.

29. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–12 (2002) (defending and enforcing the notice pleading standard against lower courts' more strict interpretations of Rule 8); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (stating that different pleading standards "must be obtained by the process of amending the Federal

With *Bell Atlantic Corp. v. Twombly*[30] in 2007 and *Ashcroft v. Iqbal*[31] in 2009, the Supreme Court abrogated *Conley's* notice pleading—sending shockwaves throughout the legal community in the process.[32] In *Twombly*, a Sherman Antitrust Act[33] case, the Court changed pleadings from merely requiring notice to requiring "plausibility."[34] Two years later, the Court returned to the plausibility pleading standard in *Iqbal*. There, the Court applied the new plausibility pleading standard to all federal claims, as opposed to just antitrust suits, and overruled *Conley* in the process.[35]

In federal court, merely providing notice is no longer sufficient to survive dismissal. Plaintiffs must now allege "enough facts to state a claim to relief that is plausible on its face."[36] More specifically, to avoid dismissal under 12(b)(6), plaintiffs must plead facts sufficient to "nudge[] their claims across the line from conceivable to plausible."[37]

Commentators have closely scrutinized the impact of the plausibility pleading standard. Many fear that, contrary to the words of the Court,[38] the pleading standard had in fact been heightened and had become less plaintiff-friendly. In the words of one commentator, federal pleading had become "a significant veto-gate through which all claims must pass."[39]

B. The Federal and State Responses to the Federal Rules and Plausibility Pleading

Prior to the Supreme Court's adoption of the FRCP, state and federal courts employed a hodgepodge of pleading standards.[40] Part of the impetus for the FRCP was to fix this problem. Indeed, the desire for procedural uniformity within federal courts played a *central* role in the

Rules, and not by judicial interpretation").

30. 550 U.S. 544 (2007).

31. 556 U.S. 662 (2009).

32. A. BENJAMIN SPENCER, PLEADING IN STATE COURTS AFTER *TWOMBLY* AND *IQBAL* 2 (2010), *available at* http://ssrn.com/abstract=2038349.

33. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7 (2012)).

34. *Twombly*, 550 U.S. at 556.

35. *Iqbal*, 556 U.S. at 684.

36. *Twombly*, 550 U.S. at 570.

37. *Id.*

38. See i*d.* ("[W]e do not require heightened fact pleading of specifics . . . .").

39. Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 161 (2010).

40. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1170 (2005).

movement to adopt the FRCP.[41] After their passage, the FRCP were hailed as "a triumph of uniformity over localism."[42] Though adopted with broad appeal, the FRCP could only, by definition, apply to the federal courts. The states, however, did not ignore the change. In 1940, Arizona's Supreme Court adopted the FRCP verbatim, making Arizona the first federal replica state—"that is, a state with a procedural system modeled after the Federal Rules."[43] By 1975, twenty-three states had become federal replica states.[44] By 2007, when *Twombly* was decided, twenty-six states and the District of Columbia had altered their procedural rules to resemble the FRCP.[45] And many states that did not model their rules exactly after the Federal Rules still looked to the FRCP for guidance.[46]

Unfortunately, the push towards national procedural uniformity has since slowed, if not reversed.[47] Many reasons have been cited, but perhaps the most compelling is that unique local concerns have weighed heavily on the minds of state judges.[48] State judges have increasingly asserted these local concerns, including "discovery abuse, expense and delay, excessive judicial power and discretion, excessive court rulemaking, unpredictability, litigiousness, an overly adversarial atmosphere, unequal resources of parties, lack of focus, and formal adjudication itself."[49] Citing these concerns and others, certain state courts have become less willing to follow the federal courts' example.[50]

Recall that the replica states, following the Supreme Court's lead,

41. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 312 (2001).

42. Erwin Chemerinsky & Barry Freidman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995).

43. Chen, *supra* note 2, at 1437.

44. Oakley, *supra* note 5, at 356–58.

45. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting).

46. *See* Thomas D. Rowe, Jr., *A Comment on the Federalism of the Federal Rules*, 28 DUKE L.J. 843, 843 (1979). ("Well over half the states now have civil rules closely patterned after the [FRCP], and movement toward adoption of federal-model rules continues in at least some way in the other states." (footnote omitted)).

47. Oakley, *supra* note 5, at 355.

48. Michalski, *supra* note 14, at 113.

49. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 911–12 (1987) (footnotes omitted).

50. *See, e.g.*, Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 430 (Tenn. 2011) (declining to adopt the new plausibility standard in state court); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 864 (Wash. 2010) (same).

had adopted the *Conley* "no set of facts" liberal notice pleading standard. After the Court's adoption of plausibility pleading in *Twombly* and *Iqbal*, these courts, in addition to those in non-replica states, have the opportunity to reevaluate their own procedural systems. "*Iqbal* thus creates a tension between the desire of some states to achieve uniformity with federal courts and the desire to follow the same standard as other states."[51]

II. THE QUESTION

Federal and state courts face different procedural obligations. In federal court, federal procedure takes precedence—it applies, in large part, in both subject matter and diversity jurisdiction cases; when a Federal Rule governs the matter, the Federal Rule applies.[52] Therefore, regardless of whether the court adjudicates a federal or state substantive claim, there is no procedural uniformity concern. State courts, in contrast, are faced with a slightly different situation. In state court, state procedures always apply to state substantive claims.[53] When the state court adjudicates federal substantive claims, however, the Supremacy Clause comes into play.[54] Consequently, the situation is not nearly so clear. As discussed in Part III, sometimes state procedure applies and other times federal procedure applies.

This presents an intriguing set of scenarios. If a state had replicated the Federal Rules in all cases and incorporated plausibility pleading across the board, theoretically there would be pure procedural uniformity for both state and federal courts applying both state and federal substantive law. But if a state retains its own set of civil procedures, the procedure applied in state and federal adjudications, as well as between federal adjudications of state and federal substantive law, will differ. For advocates of uniformity, this second scenario is clearly less desirable.

The above scenarios are premised upon a state's ability to choose its own procedure. But, as is discussed below, that premise is not

51. Michalski, *supra* note 14, at 114.

52. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

53. *See, e.g.*, *Webb*, 346 S.W.3d at 430 ("Although federal judicial decisions 'interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule,' they 'are non-binding even when the state and federal rules are identical.'" (quoting Harris v. Chern, 33 S.W.3d 741, 745 n.2 (Tenn. 2000))).

54. Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 20 (2006).

certain.[55] And, were a state forced to implement federal procedure in certain cases, a much more complex scenario would arise: two systems of procedure would exist in both state and federal court adjudications—one for state law substantive claims, another for federal substantive law claims. For those preaching uniformity, this would be a disaster.[56]

Unfortunately for uniformity-advocates, this latter scenario is gaining traction. Through a variety of cases, the Supreme Court has imposed federal procedure upon certain state court adjudications of federal substantive law.[57] The theory at the foundation of this development, Reverse-*Erie*, has been largely unexplored.

The general formulation of the question this Note seeks to answer—the heart of Reverse-*Erie*—is therefore, "which procedure—federal or state—must apply in an Alaska state court adjudication of a federal substantive claim when Congress, the Constitution, and the Courts have remained silent on this issue?" The more specific form asks this same question but with regards to pleading standards in particular.

As states, including Alaska, now evaluate whether to change their pleading standards,[58] Reverse-*Erie*, while obscure, may, if the answer to the question asked is that federal procedures must apply, have serious consequences. In certain cases, Alaska state courts may be obligated to use the plausibility standard of *Ashcroft v. Iqbal*[59] rather than the "no set of facts" standard currently in effect.

As "[p]leading comes early in the life cycle of a case, shapes litigation strategy, reveals valuable information to the opposing party (that can be used to encourage settlements), and is the gateway to all subsequent procedural devices,"[60] its significance cannot be underestimated. The logistics of procedural rule changes aside, the imposition of federal procedure in state court adjudication carries with it concerns of federalism and the balance of power between the state and federal court systems.

55. *See infra* Part IV.

56. Of course, for advocates of broad federalism, the same situation could be utopic.

57. *See infra* Part III.

58. *See* Michalski, *supra* note 14, at 109 ("In the months and years to come, other states will face the dilemma [of whether to change their rules or not].").

59. 556 U.S. 662 (2009).

60. Michalski, *supra* note 14, at 111.

III. REVERSE-*ERIE*

A. The Doctrine

In 1938, the Supreme Court decided *Erie Railroad Co. v. Tompkins*.[61] This was seemingly a narrow decision—answering only a single question of which substantive law, federal or state, applied in certain federal court proceedings.[62] However, *Erie* went on to spawn decades of litigation, the cumulative result of which has come to be known as the *Erie* Doctrine. The *Erie* Doctrine encompasses, on its face, a judicial choice-of-law methodology, "commonly understood to embrace all situations in which [a federal] court must choose between federal or state law."[63] Sprawling across thousands of cumulative pages in casebooks and law student outlines, and across hundreds of court opinions and law review articles, the *Erie* Doctrine stands, in the words of Justice Harlan, as "one of the modern cornerstones of our federalism"[64]—a way for the judiciary to balance the scales of power between state and federal governments. For the purposes of this Note, however, it suffices to describe the doctrine as the narrow answer *Erie* itself addressed: which law, federal or state, applies in a federal court proceeding.

Given the *Erie* Doctrine's prominence, it may seem odd that it has been described as merely "a false front on a movie set,"[65] and only "the opposite side of the federalism coin."[66] Behind the traditional *Erie* Doctrine's fake front (or on its other side, depending on your metaphor of choice) looms a similar, yet distinct, question. This question broadly asks which law, federal or state, applies in a *state* court proceeding.[67] Theoretically, the answer to this question ("Reverse-*Erie*") has the potential to have as much of an impact, if not greater, on the judicial system than its traditional cousin. While the *Erie* Doctrine applies only in federal court—a judicial system of limited jurisdiction—Reverse-*Erie* applies in state courts—judicial systems of extremely broad jurisdiction. As one scholar has commented, Reverse-*Erie* "seems to pose a question at least as important as *Erie*—and in fact numerically far more significant

61. 304 U.S. 64 (1938).
62. *Id.* at 69.
63. Donald L. Doernberg, *The Unseen Track of* Erie Railroad*: Why History and Jurisprudence Suggest a More Straightforward Form of* Erie *Analysis*, 109 W. VA. L. REV. 611, 612 n.2 (2007).
64. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).
65. Clermont, *supra* note 54, at 2.
66. *Id.* at 4.
67. *Id.* at 2.

because, as everybody knows, the volume of business in state courts dwarfs that in federal courts."[68]

Unfortunately, unlike the *Erie* Doctrine, this Reverse-*Erie* Doctrine is not nearly as ubiquitous as its traditional counterpart. In fact, in a 2006 survey of law school casebooks, Cornell Law Professor Kevin M. Clermont noted that, while all eighteen mainstream civil procedure casebooks cover the *Erie* Doctrine,[69] (devoting an average of sixty-three pages to it),[70] seven casebooks avoid the Reverse-*Erie* Doctrine entirely,[71] three mention it only in passing,[72] three mention its bare bones[73] and only five afford any sort of serious attention to it,[74] all devoting fewer than ten pages to the doctrine.[75] Even more remarkably, out of the eight current mainstream federal courts casebooks examined by Professor Clermont, three do not address the topic at all,[76] four mention it with a glancing, secondary focus[77] and only one devotes serious attention to it.[78] "While everyone has an *Erie* theory and stands ready to debate it," Professor Clermont lamented, "almost no one has a theory of [R]everse-*Erie*, and no one at all has developed a clear choice-of-law methodology for it."[79] For something that is "often misunderstood, mischaracterized, and misapplied by judges and commentators," it is strange that most scholars ignore it completely.[80]

There is, however, ample reason for both this lack of attention and the confusion surrounding the doctrine. First, although it may be tantalizing to call Reverse-*Erie* the mirror image of *Erie*,[81] Reverse-*Erie* actually poses a distinct question:[82] to what extent do state courts, when

68. *Id.* at 4.
69. *Id.* at 50 n.198.
70. *Id.* at 50.
71. *Id.* at 51.
72. *Id.* at 51 n.199.
73. *Id.* at 51 n.200.
74. *Id.* at 51 n.201.
75. *Id.* at 51.
76. *Id.* at 53 n.209.
77. *Id.* at 53 n.210.
78. *Id.* at 54 n.211.
79. *Id.* at 2.
80. *Id.*
81. *See, e.g.*, Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 100 (1998) (referring to Reverse-*Erie* cases as "the mirror-image of the situation involved in the Court's famed decision in *Erie Railroad Co. v. Tompkins*").
82. *See* Clermont, *supra* note 54, at 4 ("Reverse-*Erie* [asks] . . . [i]n state court, when does state law apply and when does federal law apply? By this formulation, reverse-*Erie* poses a question very similar to the *Erie* question—although tantalizingly, it does not have an identical answer.").

adjudicating substantive federal rights, have to use federal procedures in lieu of state procedures?[83] Second, this specific question is rarely addressed. There are very few cases that touch upon Reverse-*Erie* in any meaningful way. The cases that do exist are, unfortunately, spread widely throughout the twentieth century. Moreover, each case follows a different approach on how to resolve the Reverse-*Erie* question.[84] Additionally, remarkably few law review articles have addressed Reverse-*Erie*.[85] Those that have addressed the doctrine have not agreed on how to interpret the case law.[86] Third, Reverse-*Erie* touches upon several different and substantial legal doctrines, many of which are well-known and within which it is easy to get lost in the concepts discussed and language used: conflict-of-law,[87] commandeering,[88] pre-emption,[89] the Supremacy Clause,[90] and the related doctrine of *Testa v. Katt*,[91] to name a few. The use of such concepts and language in Reverse-*Erie* scholarship usually results in a mixed terminology, increased confusion, and decreased clarity.

Our knowledge of the Reverse-*Erie* problem stems from the few Supreme Court cases to touch upon the doctrine. Unfortunately, while state courts routinely handle Reverse-*Erie* cases, their decisions do not shed particularly helpful light on the subject.[92] And in cases where state courts have either recognized or discussed the issue, they have tended to

83. Oliveri, *supra* note 16, at 1378.

84. *See infra*; *See also* Redish & Sklaver, *supra* note 81, at 101 ("At various times, the Supreme Court appears to have chosen among . . . different models in order to resolve the converse-*Erie* question, albeit without expressly recognizing those differences.").

85. *See* Clermont, *supra* note 54, at 2 n.5 (summarizing the literature as of 2006).

86. *Compare, e.g.*, *id.* at 23–27 (describing a split between two interest balancing theories: pre-emption and judicial choice-of-law), *with* Oliveri, *supra* note 16, at 1378–83 (describing a split between two choice of law presumptions: pro-federal and pro-forum).

87. *See, e.g.*, Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 976–83 (2001). And, within discussions of conflict-of-law, both "interest analysis" and "sovereignty" principle language are common. *See, e.g.*, *id.* at 979, 984.

88. *See, e.g.*, *id.* at 958–63.

89. *See* Clermont, *supra* note 54, at 5 (noting that many scholars often start their discussions of Reverse-*Erie* with a pre-emption analysis).

90. U.S. CONST., art. VI, cl. 2; *see, e.g.*, Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1784 (1992).

91. 330 U.S. 386 (1947); *see, e.g.*, Reza Dibadj, *From Incongruity to Cooperative Federalism*, 40 U.S.F. L. REV. 845, 874 (2006).

92. *See* Clermont, *supra* note 54, at 29 n.134 ("There are literally millions of state cases applying reverse-*Erie*, because the choice-of-law issue is ubiquitous. But most such applications are intuitive. Few cases shed light on the appropriate methodology." (citations omitted)).

defer to Supreme Court precedent.[93] Therefore, the best indicator of the state of Reverse-*Erie* at the moment stems from the scant occasions on which the Supreme Court has addressed the doctrine.

So what do we know about Reverse-*Erie*? As a preliminary matter, the Reverse-*Erie* question is premised upon the pre-existence of relevant federal procedural law.[94] Based upon this foundation, scholars have divided Reverse-*Erie* into two broad categories.[95] The first category is simple. Whenever the Constitution, Congress (either explicitly or implicitly), or a federal court mandates that a certain federal procedure must be used when adjudicating a federal substantive claim, a state court is bound to apply that particular procedure.[96] The second Reverse-*Erie* category, on the other hand, is much more complicated. When the Constitution, Congress, and the federal courts are silent on which federal procedure accompanies a federal right, which procedure—federal or state—*must* a state court use when it adjudicates the federal right? It is the answer to this second question with which this Note is concerned and towards which the Alaska court system and all state court systems similarly situated should turn a watchful eye.

B. The Theories

The relevant Supreme Court cases, unfortunately, do not provide a clear answer to this second question. In fact, at times the theories they posit contradict. But by applying a source test—asking whether the procedure originated internally or externally to the substantive federal claim—the case law can be sorted into two relatively clear categories, each espousing a different Reverse-*Erie* theory. From these theories it is possible to give predictive value to the Reverse-*Erie* doctrine.[97] It is

93. *Id.* at 28–29; *see, e.g.*, Bowman v. Ill. Cent. R.R., 142 N.E.2d 104, 114 (Ill. 1957).

94. Clermont, *supra* note 54, at 11.

95. *See, e.g.*, *id.* (dividing the analysis into two "questions"); Oliveri, *supra* note 16 (dividing the analysis into two "situations"); Redish & Sklaver, *supra* note 81, at 100–01 (dividing the analysis into two "questions").

96. Clermont, *supra* note 54, at 20. Of course, this is true only if the federal procedure is constitutionally valid. *Id.* Intriguingly, an argument could be made that *Twombly* is just this sort of federal court mandate with regard to antitrust claims, and therefore that state courts must apply the heightened pleading standard in those cases regardless of state procedural law. But this Note will not address this possibility, instead focusing on only the broader question of whether Alaska's pleading standard would have to yield to the new federal standard generally, rather than in some specific subset of cases.

97. The Reverse-*Erie* literature has been, in large part, a search for predictability. Scholars have lamented the inherent unpredictability of balancing tests with unknown methodology. *E.g.*, Redish & Sklaver, *supra* note 81, at 104.

unclear, however, which theory predominates.

The first category of Reverse-*Erie* cases presents what this Note terms the "internal-source theory." In this category, a strong presumption exists in favor of the application of federal procedure in a state court adjudication of a federal substantive claim *only* when the procedure exists within the federal substantive claim's text, purpose, or legislative history. If the federal procedure does not originate from within the substantive claim, then the lex fori, the law of the jurisdiction adjudicating the claim, applies. It is within this group that the "general [conflict-of-law] rule, bottomed deeply in belief in the importance of state control of state judicial procedure, . . . that federal law takes the state courts as it finds them"[98] finds purchase.

Practically, this is accomplished through a narrow conflict pre-emption analysis, utilized to pre-empt state rules only when explicit indications of congressional intent are present. Justice O'Connor is a strong advocate of this view. In her dissent in *Felder v. Casey*,[99] she exclaimed, "without some *compellingly clear indication* that Congress had forbidden the States to apply such statutes in their courts, there is no reason to conclude that they are 'pre-empted' by federal law."[100] Interestingly, the Court engages in this conflict-of-laws substance/procedure dichotomy only to describe the situations where pre-emption is not applicable.[101] There is also a safety valve. The cases hint, albeit cryptically, that the requirement to apply federal procedure, when it exists, may yield when the imposition of the federal procedure would force a state's judicial system to undergo unduly burdensome changes.[102] Cases in this category include *Central Vermont Railway Co. v. White*,[103] *Felder*, *Howlett v. Rose*,[104] and *Johnson v. Fankell*.[105]

The second category of Reverse-*Erie* cases presents what this Note terms the "external-source theory." Here, the Court applies a balancing test to determine the application of federal procedure when a state court

98. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

99. 487 U.S. 131 (1988).

100. *Id.* at 157 (O'Connor, J., dissenting) (emphasis added).

101. *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 373 (1990) (using this language to refer to the other state procedural rules that the Court did not pre-empt).

102. *See* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363–64 (1952) (noting that, had Ohio abolished trial by jury in *all* negligence cases, then perhaps the Court would not have forced the state to hold a jury trial in the negligence case before it); *see also* Redish & Sklaver, *supra* note 81, at 103–04 (analyzing *Dice*).

103. 238 U.S. 507 (1915).

104. 496 U.S. 356 (1990).

105. 520 U.S. 911 (1997).

adjudicates a federal substantive claim, even when the procedure originates outside of the text, purpose, or legislative history of the substantive claim.[106] This balancing test is weighted in favor of keeping federal substantive claims and federal procedures together. It is unclear, however, how rebuttable or strong this presumption is as the reasoning behind the imposition of federal procedure has varied from case to case.[107]

Unlike the internal-source theory, the external-source theory is marked by its minimal reliance on pre-emption and heavy use of alternative theories to justify the application of federal procedure in state court.[108] For example, it is not uncommon to see the Court frame the problem entirely in conflict-of-law terms, tracking the general conflict-of-law principle that "a forum state may apply its own procedural law to all rights of action that it enforces."[109] Whereas the Court will mirror this language when it follows the internal-source theory, it uses it in an opposite way. Under the internal-source theory, this language is invoked to describe the situation when the state procedural rule at issue is *not* pre-empted. Conversely, the Court under the external-source theory will usually reclassify the state procedural rule at issue as substantive and then use the conflict language *to* pre-empt it. Here, the Court will refer to the state procedure as "too substantial a part of the rights . . . to permit it to be classified as a mere 'local rule of procedure'," [110] or reclassify the rule as "part of the very substance of his claim [that] cannot be considered a mere incident to a form of procedure."[111] This reclassification language, commonly found in conflict-of-law cases, tracks the external-source theory regardless of whether the rule is mentioned in the text, purpose, or legislative history of the claim in question. Cases in this category include *Central Vermont*, *Garrett v. Moore-McCormack Co.*,[112] *Brown v. Western Railway of Alabama*,[113] *Dice v. Akron, Canton & Youngstown Railraod Co.*,[114] *Felder*, and *Johnson*.

106. *See generally, e.g.*, Brown v. W. Ry. of Ala., 338 U.S. 294 (1949) (applying a federal procedure that originated outside of the substantive federal claim).

107. *Compare Johnson*, 520 U.S. 911 (avoiding imposing federal procedure in the face of a weak federal interest and strong state interests), *with Brown*, 338 U.S. 294 (imposing a federal procedure because the state procedure would "burden federal rights").

108. *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 361–62 (1952) (relying heavily on conflict-of-law reasoning).

109. Bellia, *supra* note 87, at 978.

110. *Dice*, 342 U.S at 363.

111. Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942).

112. 317 U.S. 239 (1942).

113. 338 U.S. 294 (1949).

114. 342 U.S. 359 (1952).

Note that *Central Vermont*, *Felder*, and *Johnson* are included in both the internal- and external-source-theory-case lists. That is because these three cases contain strands of both internal- and external-source theories. The Supreme Court, in these cases, gave multiple reasons for its decisions without selecting a predominant theory—a fact that exacerbates the confusion associated with Reverse-*Erie.* Because of this, the portion of the opinions positing the internal-source theory will be discussed along with the other internal-source-theory cases, and the external-source-theory portions will be discussed with the other external-source-theory cases.

It may be tempting to see the internal-source theory merely as dealing with pre-emption and the external-source theory merely as a manifestation of conflict-of-law principles. Indeed, if that were true, there would be no need to reclassify these theories into these newly termed categories. But the reality is not that simple. Both theories incorporate bits of the other—the internal sometimes using a balancing approach and the external occasionally venturing into pre-emption territory. In both internal- and external-source-theory cases, the various underlying principles at work combine to form a single Reverse-*Erie* understanding. Describing both internal- and external-source theories as merely the individual parts that form them would therefore be confusing and ultimately unhelpful. Instead, the reclassification of the Court's grouping of underlying principles under new headings in the hopes of providing clarity and predictability in the Reverse-*Erie* debate.

1. Internal-Source-Theory Cases

a. Central Vermont Railway Co. v. White – 1915

In 1915, the Court decided one of the earliest Reverse-*Erie* cases, *Central Vermont Railway Co. v. White*.[115] *Central Vermont* provides a cutaway glimpse into the inner-workings of a nascent Reverse-*Erie* theory. Indeed, this case contains early strands of both internal- and external-source theories. As such, it is a helpful starting point on which to base this analysis.

On January 12, 1912, Enoch White, a brakeman for the Central Vermont Railway Company, was killed when a faster moving train on the same track hit his train from behind.[116] Moments before the accident, the faster moving train was given a clearance card by the railway company "indicating that the track ahead was clear and that it might

115. 238 U.S. 507 (1915).
116. *Id.* at 509–10.

proceed."[117] White's widow, the administratrix of his estate, sued the railway company in Vermont, under the Federal Employers Liability Act (FELA),[118] for negligence.[119] The case centered on the question of which party should bear the burden of proof for contributory negligence.[120] Under Vermont state law, the plaintiff bore the burden of proof.[121] Federal law, in contrast, placed the burden of proof upon the defendant.[122] The text of FELA was silent as to burden of proof.[123]

Oral argument in the Supreme Court was devoted to the question of which law applied.[124] The railway argued that because the law at issue was procedural, the lex fori (law of the forum) must apply.[125] White's estate argued that because the suit arose under FELA, a federal law, federal procedural law must apply.[126] Resolving the issue, the Supreme Court applied the federal procedural law.[127] The Court's explanation, however, was opaque. The Court declined to select between the two separate lines of reasoning it supplied. The argument discussed here tracks the internal-source theory. The Court's external-source-theory argument is discussed in the next Section.

In relevant part, the Court attacked the case from a conflict pre-emption point of view.[128] When state procedural rules either bar the remedy or destroy the liability created by the federal substantive law, the Court commented, then "the law of the jurisdiction, creating the cause of action . . . would control."[129] The Court's contention tracks traditional principles of conflict pre-emption, namely, that state laws are pre-empted by federal law whenever "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[130] Here, the Court held that "Congress, in passing [FELA], evidently intended that the Federal statute be construed in the light of [federal court decisions which] . . . have uniformly held that, as a matter

117. *Id.* at 509.
118. 45 U.S.C. §§ 51–60 (2012).
119. *Cent. Vt.*, 238 U.S. at 508.
120. *Id.* at 510–11.
121. *Id.*
122. *Id.* at 512.
123. *Id.* at 511.
124. *Id.*
125. *Id.*
126. *Id.* at 512.
127. *Id.*
128. *Id.* at 511.
129. *Id.*
130. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (alterations in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

of general law, the burden of proving contributory negligence is on the defendant."[131] Under this conflict pre-emption language, then, federal law must apply because not applying the rule would frustrate congressional intent.

This argument reflects the internal-source theory. The Court applied a narrow conflict pre-emption analysis, limiting its pre-emption doctrine to only those cases where congressional intent was clear. Note that the pre-emption analysis is fairly straightforward. Throughout the twentieth century, however, as both internal- and external-source theories developed, the Court's reasoning became more complex, incorporating more theories into its analysis.

b. Felder v. Casey – 1988

Seventy-three years later, the Court revisited the internal-source theory. In *Felder v. Casey*,[132] the Supreme Court rejected the view that state courts take all federal substantive law free of accompanying federal procedure and may apply their own state procedures.[133] On July 4, 1981, Milwaukee native Bobby Felder was stopped by police officers for questioning in the midst of a search for an armed suspect.[134] During the questioning, the interrogation turned violent and Felder was beaten and arrested.[135] Nine months later, Felder filed a Section 1983[136] claim against the city of Milwaukee and certain police officers, claiming that his beating and arrest were both "unprovoked and racially motivated."[137] The police officers quickly moved to dismiss Felder's case, arguing that his suit failed to comply with Wisconsin's notice-of-claim statute, a local state procedure.[138] That statute required that every action against any state entity include a written notice of the claim within 120 days of the alleged injury.[139] The federal statute, Section 1983, contained no such notice-of-claim requirement.[140] The state trial court dismissed the case,

131. *Cent. Vt.*, 238 U.S. at 511–12.
132. 487 U.S. 131 (1988).
133. *Id.* at 137. The Wisconsin Supreme Court had adhered to the strict procedure/substance dichotomy. *See id.* (describing the Wisconsin Supreme Court as reasoning that "while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals").
134. *Id.* at 134.
135. *Id.*
136. 42 U.S.C. § 1983 (2012).
137. *Felder*, 487 U.S. at 135.
138. *Id.* at 136.
139. *Id.*
140. *See id.* at 140 ("[In the federal system,] *the absence of any notice-of-claim*

applying the state procedural rule to the federal substantive claim.[141] On appeal, the Wisconsin Supreme Court affirmed, holding that while Congress may establish federal procedure, the states retain the authority to prescribe the procedure for all substantive actions, federal or state, brought in their courts.[142] The United States Supreme Court reversed and applied federal procedure.[143]

The Court relied on two distinct lines of reasoning to explain its decision to apply federal procedure to the federal substantive claim in state court. In the first part of its opinion, the Court adopted a conflict pre-emption analysis coupled with a limited version of the substance/procedure analysis found in conflict-of-law cases. For pre-emption, the Court held that "the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983 . . . ."[144] Regarding the substance/procedure analysis, the Court stated that the "the general and unassailable proposition . . . that states may establish the rules of procedure . . . in their own courts," is limited only to those situations where there exists no pre-emption problem.[145] In the face of the Wisconsin Supreme Court's holding that the only test is one of substance or procedure,[146] the Court commented that "[h]owever equitable this bitter-with-the-sweet argument may appear in the abstract, it has no place under our Supremacy Clause analysis."[147]

This line of reasoning tracks the internal-source theory almost exactly. The Court carefully protected federal substantive claims while deftly leaving room for states to apply their own procedures in certain situations. Indeed, "[s]tates may make the litigation of federal rights as congenial as they see fit . . . because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals."[148] This decision reflects "a high degree of care and effort" on the part of the Court to maintain separate spheres of state and federal authority.[149]

While its pre-emption language is strong, the Court did not yet appear committed to either theory as the sole source of its Reverse-*Erie* jurisprudence. That is because the Court also put forth the more expansive external-source theory in its opinion, which is discussed

provision is not a deficiency requiring the importation of such statutes into the federal civil rights scheme." (emphasis added)).

141. *Id.* at 137.
142. *Id.*
143. *Id.* at 138.
144. *Id.*
145. *Id.* at 138, 150.
146. *Id.* at 137.
147. *Id.* at 150.
148. *Id.* at 151.
149. Redish & Sklaver, *supra* note 81, at 107.

below in Part III.B.3.e.

c. Howlett v. Rose – 1990

In *Howlett v. Rose*,[150] another Section 1983 case, the Supreme Court faced a Florida waiver-of-sovereign-immunity statute that prevented certain Section 1983 cases from being brought in state court.[151] Mark Howlett, a minor and former high school student, sued his school board and three school officials in Florida state court, claiming, in relevant part,[152] that his former assistant principle made an illegal search of his car in alleged contravention of Howlett's Fourth and Fourteenth Amendment rights.[153] The defendants asserted their sovereign immunity pursuant to Florida state procedure and moved to dismiss the Section 1983 claim.[154] As the Supreme Court later noted, a sovereign immunity defense would not have been available had the case been brought in federal court.[155]

The Supreme Court reversed the Florida courts, holding that the Supremacy Clause pre-empted the application of the state procedural rule.[156] Regardless of whether the rule constituted a substantive or procedural rule, the Court found that since federal courts had already interpreted the relevant portions of Section 1983, a state statute was constitutionally estopped from altering that interpretation:

> Since this Court has construed the word 'person' in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant. Conversely, since the Court has held that municipal corporations and similar governmental entities [like the School Board here] are 'persons,' a state court entertaining a § 1983 action must adhere to that interpretation.[157]

Even more pertinently, the Court found that Congress, by including municipalities within the class of persons subject to Section 1983 liability, had already addressed the issue and therefore that the

150. 496 U.S. 356 (1990).
151. *Id.* at 359–60.
152. Howlett's claim also included several state law causes of action. *Id.* at 359. These claims are, however, irrelevant to Reverse-*Erie*.
153. *Id.*
154. *See id.* (describing how Florida's waiver-of-sovereign-immunity statute did not cover section 1983 claims).
155. *Id.*
156. *Id.* at 375.
157. *Id.* at 376 (citations removed).

state was pre-empted from altering the congressional act.[158]

The Court's decision nicely tracked the internal-source theory. Indeed, *Howlett* stands as one of the few pure internal-source-theory cases. First, the Court cited "the general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, . . . that federal law takes the state courts as it finds them.'"[159] Second, the Court cited the pre-emption holding from *Felder* that "states may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law."[160] Third, and most revealing, the Court committed itself to an understanding of federalism based on the internal-source theory. "These principles," the Court held, "are *fundamental* to a system of federalism in which state courts share responsibility for the application and enforcement of federal law."[161] Running through these points, the Court committed itself to only imposing federal procedure in cases of pre-emption, leaving state adjudication of federal claims alone. Seventy-five years after *Central Vermont*, the Court appeared committed to the internal-source theory as the sole method of Reverse-*Erie* analysis. That commitment, however, did not last.

d. Johnson v. Fankell – 1997

In *Johnson v. Fankell*,[162] the most recent Reverse-*Erie* case, a unanimous Court presented both internal- and external-source theories simultaneously without favoring one over the other. At issue was a Section 1983 claim made by a liquor store clerk in Idaho against her former employer, in which she claimed a deprivation of her Fourteenth Amendment Due Process rights.[163] The clerk's employers claimed qualified immunity.[164] When their motion to dismiss was denied, they appealed, treating the denial as an appealable final judgment.[165] Had they been in federal court, it would have been.[166] Under Idaho state procedure, however, the denial of a qualified immunity defense is not

158. *Id.*
159. *Id.* at 372 (quoting Hart, *supra* note 98).
160. *Id.* (citing Felder v. Casey, 487 U.S. 131, 150 (1988)).
161. *Id.* at 372–73 (emphasis added).
162. 520 U.S. 911 (1997).
163. *Id.* at 913.
164. *Id.*
165. *Id.* at 913–14.
166. *See* Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (holding that a federal court's rejection of a qualified immunity defense is an immediately appealable final decision under 28 U.S.C. § 1291 (2012)).

considered an appealable final decision.[167] The Idaho Supreme Court therefore dismissed the appeal.[168] After granting certiorari, the United States Supreme Court upheld the dismissal.[169] For the first and only time in these cases, the Court put a limit on the intrusion of federal procedural rules into state court adjudications and refused to pre-empt state procedure.[170]

The Supreme Court refused to allow the federal procedure here to intrude into state court for two primary reasons. The first is discussed here. The second, an external-source-theory-based reason, is discussed in the following Section. Here, the Court did not veil its search for the source of the procedural obligation: "[i]n evaluating [petitioner's] contention, it is important to focus on the precise source and scope of the federal right at issue."[171] The Court noted that the procedure the petitioners sought did not exist in Section 1983, under which petitioners had been sued.[172] Rather, it existed in Section 1291 of Chapter 28 of the United States Code.[173] "The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum."[174] Providing context, the Court cited a previous holding from *Dice v. Akron, Canton & Youngstown Railroad Co.*:[175] "[i]n that case, however, we made clear that Congress had provided *in FELA* that the jury trial procedure was to be part of claims brought under the Act."[176]

This reasoning tracks the internal-source theory. The Court's language hinted that, had the appeal of the qualified immunity been included in the text, purpose, or legislative history of Section 1983, federal procedure would have applied in Idaho.[177] Instead, as the source of the procedure was Section 1291, a different statute, the state was under no obligation to enforce it.[178] The Court also cited the classic internal-source theory language that "federal law takes the state courts as it finds them."[179] Finally, the Court relied heavily on *Howlett*,

167. *Johnson*, 520 U.S. at 914.
168. *Id.*
169. *Id.*
170. *Id.* at 923.
171. *Id.* at 921.
172. *Id.*
173. *Id.*
174. *Id.*
175. 342 U.S. 359 (1952).
176. *Johnson*, 520 U.S. at 921 n.12. (citing *Dice*, 342 U.S. at 363).
177. *See id.* at 921 ("[I]t is important to focus on the precise *scope and source* of the federal right at issue" (emphasis added)).
178. *Id.*
179. *Id.* at 919 (quoting Howlett v. Rose, 496 U.S. 356, 372 (1990)).

described above as one of the few pure internal-source-theory cases, in this part of its opinion.

Notably, the Court inserted a safety valve into the internal-source theory. At the very end of the opinion, the Court expressed repulsion at the thought of displacing fully established state court procedural systems: "[t]he 'countervailing considerations' at issue here are even stronger . . . . This respect [for principles of federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts."[180] As this comment came at the end of the opinion, it is unclear to which theory it is supposed to adhere. Most likely, this comment applies equally to both, reminding scholars that neither theory is black and white and, like Professor Clermont carefully noted, while pre-emption plays a big part in the Reverse-*Erie* analysis, there is always room for judicial choice-of-law.[181]

2. Summary of Internal-Source Theory

As of *Johnson*, the internal-source theory has survived eighty-two years of Supreme Court jurisprudence. From this longevity, we can glean some predictive value. We know that, under an internal-source theory of Reverse-*Erie*, the Court is likely to apply a narrow conflict pre-emption theory, only pre-empting when congressional intent is clear. Outside of those instances, the Court is reticent to reclassify procedural rights as substantive and is eager to let state courts apply their own procedural rules to federal causes of action. This theory is not black and white, however; a slight balancing test applies. The Court is unlikely to pre-empt state procedure when doing so would force the state court system to restructure its procedural rules in a significant way. The internal-source theory attempts to adhere to strict principles of federalism and is concerned with the federal/state balance of powers.

3. External-Source-Theory Cases

a. Central Vermont Railway Co. v. White – 1915

Recall that in *Central Vermont Railway Co. v. White*,[182] a brakeman for the Central Vermont Railway Company was killed when a faster moving train hit his train from behind.[183] The case centered on the

180. *Id.* at 922.
181. Clermont, *supra* note 54, at 20.
182. 238 U.S. 507 (1915).
183. *Id.* at 509–10.

question of which party bore the burden of proof for contributory negligence.[184] Under Vermont state law, the plaintiff bore the burden of proof.[185] Federal law, by contrast, placed the burden of proof on the defendant.[186] Crucially, the text of FELA was silent as to burden of proof.[187]

Arguing from an internal-source-theory mindset, the Court initially found that "Congress, in passing [FELA], evidently intended that the Federal statute be construed in the light of [federal court decisions]."[188] These decisions "uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant."[189] Using this conflict pre-emption language, the Court held that federal law must apply because not applying the rule would frustrate congressional intent.

But the Court also supplied a second, distinct reason for its holding.[190] This second line of reasoning is notable for its minimal reliance on pre-emption and heavy reliance of conflict-of-laws principles.[191] One important conflict-of-law principle is that "a forum state may apply its own procedural law to all rights of action that it enforces."[192] So, with respect to the relationship between federal and state law, state courts are generally free to apply their own procedural rules.[193] The *Central Vermont* Court acknowledged as much, saying that "as long as the question involves a mere matter of procedure . . . the state court can . . . follow their own practice even in the trial of suits arising under the Federal law."[194] But the Court reclassified the local rule in *Central Vermont* from one of procedure to one of substance.[195] This forced the application of the federal rule for contributory-negligence burdens.

This reasoning tracks the external-source theory. While it is unclear

184. *Id.* at 510–11.
185. *Id.* at 510.
186. *Id.* at 512.
187. *Id.* at 511.
188. *Id.* at 512.
189. *Id.*
190. *Id.* at 511.
191. *See id.* ("There can, of course, be no doubt of the general principle that matters respecting the remedy . . . depend upon the law of the place where the suit is brought.").
192. Bellia, *supra* note 87, at 978.
193. *See* Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931) ("[T]he procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.").
194. *Cent. Vt.*, 238 U.S. at 511–12.
195. *See id.* at 512 ("[I]t is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of procedure.").

whether the Court ultimately adopted the external- or internal-source theory to decide the case, its reclassification of the local rule of procedure as a substantive rule hints that it had started to think more in terms of the external-source theory. And in the Court's next Reverse-*Erie* case, the external-source theory was able to stand alone.

b. Garrett v. Moore-McCormack – 1942

In *Garrett v. Moore-McCormack*,[196] the Supreme Court committed itself to a purely external-source-theory method of reasoning. There, the Court handled a Jones Act[197] case involving the burden of proof required under admiralty law.[198] In relevant part, the Jones Act is based upon and incorporates by reference FELA, the substantive federal law at issue in *Central Vermont* and that would arise again in *Brown v. Western Railway of Alabama*[199] and *Dice v. Akron, Canton & Youngstown Railroad Co.*[200] In *Garrett*, a seaman working for the Moore-McCormack Company was injured while working on board a vessel traveling between the United States and Europe.[201] Garrett sued in Pennsylvania state court, claiming his injury was attributable to the negligence of Moore-McCormack.[202] Moore-McCormack asserted as a defense the fact that Garrett had signed a release of all liability.[203] Garrett, in turn, claimed the release was fraudulently obtained.[204] In determining the release's validity, the Pennsylvania courts enforced a state rule of procedure that placed the burden of proof upon the plaintiff to invalidate the release.[205] In contrast, if the case had been brought in federal court, the burden of proof would have been borne by the defendant,[206] even though the burden is not explicitly mentioned in either FELA or the Jones Act.[207] On appeal, the Supreme Court addressed whether state or federal procedure applied to Garrett's claim.

The Supreme Court reversed the Pennsylvania state courts and

196. 317 U.S. 239 (1942).
197. 46 U.S.C. §§ 50101–58109 (2012).
198. *Garrett*, 317 U.S. at 240.
199. 338 U.S. 294 (1949); *see infra* Part III.B.2.c.
200. 342 U.S. 359 (1952); *see infra* Part III.B.2.d.
201. *Garrett*, 317 U.S. at 240.
202. *Id.* at 240–41.
203. *Id.* at 241.
204. *Id.*
205. *Id.* at 242.
206. *Id.* at 248.
207. *See id.* at 244 ("The Act is based upon and incorporates by reference [FELA]."); *cf.* Cent. Vt. R.R. v. White, 238 U.S. 507, 511 (1915) (commenting on how FELA does not mention burdens of proof).

imposed federal procedure on the state court adjudication.[208] Oddly, the Court agreed with the method of state court analysis, though it disagreed with the ultimate result. Before the case's appeal to the United States Supreme Court, the Pennsylvania Supreme Court had applied a conflict-of-law substance/procedure dichotomy, concluding that state procedure must apply because of the court's "belief that the rule as to burden of proof on releases does not affect the substantive rights of the parties, but is merely procedural, and is therefore controlled by state law."[209] In reversing the Pennsylvania Supreme Court, the United States Supreme Court retained the conflict-of-law analysis but reclassified the burden of proof as a substantive requirement.[210]

The Supreme Court's (and the Pennsylvania Supreme Court's) reasoning tracked the external-source theory. Because it could not cite a part of the Jones Act relating to the burden of proof, the Court avoided a pre-emption analysis, and instead turned to other sources of broad federal supremacy.[211] The Court specifically referred to a desire for uniform application of federal law, irrespective of local rules of procedure.[212] The Court's analysis culminated in a reclassification of the burden-of-proof requirement as substantive.[213] The Court therefore displaced a state rule of procedure not because *Congress* declared the burden of proof to be "the very substance of [a Jones Act] claim,"[214] but, rather, because the *Court* itself did. And once the right was declared to be one of substance, as opposed to procedure, the Court could freely impose it on state adjudications.[215]

c. Brown v. Western Railway of Alabama – 1949

Seven years later, in *Brown v. Western Railway of Alabama*,[216] the Supreme Court built on *Garrett*'s acceptance of the external-source theory by refocusing the analysis. The Court shied away from the conflict-of-law principles that it had utilized in *Garrett* and instead used a conflict pre-emption analysis to determine which rule of pleading should apply. What separates this case from those under the internal-

208. *Garrett*, 317 U.S. at 243.
209. *Id.* at 242.
210. *Id.* at 249.
211. *See, e.g.*, *id.* at 244 ("[T]his Court has [often] declared the *necessary dominance* of *admiralty principles* in actions in vindication of rights arising from admiralty law." (emphases added)).
212. *Id.*
213. *Id.* at 248–49.
214. *Id.* at 249.
215. *Id.* at 245.
216. 338 U.S. 294 (1949).

source theory and what gives the external-source theory its name is that here, unlike in *Howlett v. Rose*[217] for example, the federal procedure originated outside of the federal substantive claim.

In the case, Richard Brown brought a FELA claim against the Western Railway of Alabama in a Georgia state court.[218] The defendant railway claimed that Brown's pleading "failed to set forth a cause of action and is otherwise insufficient in law."[219] Both the state trial court and state court of appeals agreed with the railway and found Brown's claim to be insufficiently pleaded under Georgia's strict pleading standards.[220] The case was appealed up to the United States Supreme Court, which granted certiorari because "the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts."[221] The Supreme Court, applying federal pleading standards, reversed the state courts' decisions and held that Brown's pleading was sufficient.[222]

In analyzing the case, the Court made several interesting moves. The Court first side-steped the conflict-of-law substance/procedure analysis, saying that the extent to which "rules of practice and procedure may dig themselves into substantive rights is a troublesome question" and that its own precedent revealed "the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.'"[223]

Instead of a conflict-of-law analysis, then, the Supreme Court opted for a broad conflict pre-emption analysis. The Court determined that Georgia's pleading standard, which construed all pleadings against the pleader, burdened the federal right asserted under FELA.[224] But the Court only hinted at what it meant by "burden." The Court lamented that failing "to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings [would preclude achieving] desirable uniformity in adjudication of federally created rights."[225] The Court therefore pre-empted Georgia's pleading standard not because it was *stricter* than the federal standard, as some commenters have argued,[226] but rather because the resulting *difference* in

217. 496 U.S. 356 (1990).
218. *Brown*, 338 U.S. at 294.
219. *Id.* at 295.
220. *Id.*
221. *Id.*
222. *Id.* at 296.
223. *Id.*
224. *Id.* at 298.
225. *Id.* at 299.
226. *E.g.*, Michalski, *supra* note 14, at 121.

pleading standards was undesirable.[227]

The Court's decision in *Brown* provides a helpful look into the mechanics of the external-source theory. Possibly uneasy with the thought of reclassifying a pleading rule as substantive, the Court could not rely heavily on the conflict-of-law approaches in *Garrett* and *Central Vermont*. Yet the Court still had to find some way to protect what it considered to be desirable uniformity under the newly enacted Federal Rules of Civil Procedure. The Court's solution was to expand its pre-emption jurisprudence to include pleading rules. But importantly here, the federal rule of pleading is neither mentioned in FELA's text or purpose. The Court therefore had to look outside the federal substantive claim to find the procedure it chose to enforce.

The majority's move did not escape notice. Justices Frankfurter and Jackson, in dissent, worried what this decision portended for federalism.[228] State courts, they acknowledged, are empowered to hear federal claims.[229] But they argued that, although state courts are required to implement federal substantive law, they should be allowed to apply "such structures and functions as the States are free to devise and define."[230] Moreover, the Justices believed that "if a litigant chooses to enforce a Federal right in a State court, he cannot be heard to object if he is treated exactly as [state-law-bringing] plaintiffs . . . with regard to the form in which the claim must be stated."[231] After all, the plaintiff has the choice to file his claim in either state or federal court and he chose to

227. *See Brown*, 338 U.S. at 299 (discussing the federal desire for uniformity). Professor Michalski's point that state court systems may not impermissibly burden federal rights is correct, but that was not at issue in *Brown*. *See* Michalski, *supra* note 14, at 121 (making this point). Rather, the important issue was one of uniformity, which the Court explicitly acknowledged. *See Brown*, 338 U.S. at 295 (stating that the reason certiorari was granted was because "the implications of the dismissal were considered important to a *correct and uniform application* of the federal act in the state and federal courts" (emphasis added)). Three years later, in *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, Justice Frankfurter did address Congress's purpose in passing FELA in a manner that would have implicated the strictness of Georgia's pleading standard, but no similar discussion of purpose exists in either the majority or dissenting opinions in *Brown*. *See id.* at 368 (Frankfurter, J., dissenting) ("[Pre-emption would be valid] only on the theory that Congress included as part of the right created by [FELA] an assumed likelihood that trying all issues to juries is more favorable to plaintiffs.").

228. *Brown*, 338 U.S. at 299 (Frankfurter, J., dissenting) ("Insignificant as this case appears on the surface, its disposition depends on the adjustment made between two judicial systems charged with the enforcement of a law binding on both. This, it bears recalling, is an important factor in the working of our federalism without needless friction.").

229. *Id.*

230. *Id.* at 300 (Frankfurter, J., dissenting).

231. *Id.*

file in state court, "[w]ith full knowledge of the niceties of pleading required by Georgia."[232]

d. Dice v. Akron, Canton & Youngstown Railroad Co. – 1952

In *Dice v. Akron, Canton & Youngstown Railroad Co.*,[233] the last of the pure external-source-theory cases, the Supreme Court imposed federal procedure without much explanation. In this short case, John F. Dice, a railroad fireman, was seriously injured when his train jumped the track.[234] He promptly sued the railroad under FELA in an Ohio state court.[235] As part of its defense, the railroad placed into evidence a release of liability signed by Dice.[236] The Ohio Supreme Court held that, under Ohio law, whether the release of liability was obtained fraudulently was a question for the judge, rather than the jury.[237] Federal law, in contrast, required the opposite.[238] Thus, the Supreme Court was faced with a familiar question: should the state or federal procedure apply to the FELA claim in Ohio state court?

The Court applied federal procedure to the state adjudication.[239] "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence," the Court stated, and as such, is "part and parcel of the remedy afforded railroad workers under [FELA]."[240] The Court considered the right to a trial by jury too substantial to be considered a mere "local rule of procedure" and, therefore, reclassified it as a substantive rule.[241]

This decision tracked the external-source theory because it avoided invoking a theory of pre-emption and, instead, reclassified the state's procedural rule by heavily relying on conflict-of-law principles.[242] While the Court did not explicitly state it was avoiding pre-emption-based arguments, there are two features of this case that demonstrate the

232. *Id.* at 303 (Frankfurter, J., dissenting).
233. 342 U.S. 359 (1952).
234. *Id.* at 360.
235. *Id.*
236. *Id.*
237. *Id.* at 361.
238. *Id.* at 363.
239. *Id.* at 362–64.
240. *Id.* at 363 (quoting Bailey v. Cent. Vt. R.R., 319 U.S. 350, 354 (1943)) (internal quotation marks omitted).
241. *Id.*
242. *But see* Johnson v. Fankell, 520 U.S. 911, 921 n.12 (1997) ("[I]n *Dice* we held that the FELA *pre-empted* a state rule . . . ." (emphasis added)). The Court in *Johnson* may have been misreading its own precedent, however. *See* Redish & Sklaver, *supra* note 81, at 104 ("At no point in the text of the FELA did Congress explicitly directed [sic] the state courts to employ the federal practice . . . .").

Court's move was deliberate. First, the Court *did* apply a conflict pre-emption theory in one of the other holdings in the same case.[243] Second, the dissent in the case indicates it would have signed onto the majority opinion *had* the theory used been one of conflict pre-emption.[244]

The Court therefore adopted a balancing test in which "the forum's interest in employing its own procedures is balanced against the interest of the source of the substantive law in assuring that uniform policy goals are attained."[245] The use of this balancing test was highlighted by the Court's comment that the state procedure may have survived if "Ohio [had] abolished trial by jury in *all* negligence cases including those arising under the federal Act."[246] The likely inference is that changing the state's established and widely-applied procedure would have been too burdensome for the Court to impose.

But even as the Court affirmed its use of the external-source theory in *Dice*, its dissenters grew more numerous.[247] Although it would take thirty-six years, this minority would eventually establish a majority.[248]

e. Felder v. Casey – 1988

After a thirty-six year period, the Court returned to the Reverse-*Erie* theory. Notably, the dissenting opinions that advocated for a limited pre-emption theory in *Brown* and *Dice* finally found themselves in the majority in *Felder v. Casey*.[249] Unfortunately, the best they could muster to keep that majority was a compromise. As noted earlier, *Felder* utilized both internal- and external-source theories.[250] Recall that *Felder* involved a Section 1983 claim against the city of Milwaukee and certain police officers, claiming that the beating and arrest of Bobby Felder were

243. *See Dice*, 342 U.S. at 362 ("Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act . . . ."); *cf.* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (defining conflict pre-emption as the application of federal law when state law defeats the purpose and policy of the federal law).

244. *See Dice*, 342 U.S. at 368 (Frankfurter, J., dissenting) ("[Applying federal procedures would be appropriate] only on the theory that Congress included as part of the right created by the Employer's Liability Act an assumed likelihood that trying all issues to juries is more favorable to plaintiffs.").

245. Redish & Sklaver, *supra* note 81, at 104.

246. *Dice*, 342 U.S. at 363 (emphasis added).

247. In *Brown*, only Justices Frankfurter and Jackson dissented. Brown v. W. Ry. of Ala., 338 U.S. 294 (1949). In *Dice*, Justices Reed and Burton joined them. *Dice*, 342 U.S. 359.

248. Felder v. Casey, 487 U.S. 131 (1988).

249. 487 U.S. 131 (1988).

250. *See* discussion of *Felder*, *supra* Part III.B.1.b.

both unprovoked and racially motivated.[251] The police officers moved to dismiss Felder's case, arguing that his suit failed to comply with Wisconsin's notice-of-claim statute, a local state procedure.[252] That statute required that every action against any state entity include a written notice of the claim within 120 days of the alleged injury.[253] Under federal procedures, Section 1983 contained no such notice-of-claim requirement.[254] The Wisconsin Supreme Court held that, while Congress may establish federal procedure, the states retain the authority to prescribe the procedure for all substantive actions, federal or state, brought in their courts.[255] The United States Supreme Court reversed and required the application of federal procedure.[256]

While the Court adopted a view of the pre-emption doctrine consistent with the internal-source theory, it changed gears in the middle of the opinion and provided a second reason for its holding. In this second part of its opinion, the Court adopted an outcome-determinative-based test. Because "the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in . . . federal court,"[257] the Court did not allow Wisconsin to apply its own procedure. Mirroring *Erie's* desire for vertical uniformity between state and federal court litigation,[258] the Court committed itself to a broad understanding of federalism: "the very notions of federalism upon which respondents rely dictate that the State's outcome-determinative law must give way when a party asserts a federal right in state court."[259]

This line of reasoning closely resembles the external-source theory. The Court appears to indicate that a state court adjudicating a federal law must arrive at the same conclusion a federal court adjudicating the same claim would have.[260] Such a holding leaves little room for state

251. *Felder*, 487 U.S. at 135.
252. *Id.* at 135–36.
253. *Id.* at 136.
254. *See id.* at 140 ("[In the federal system] *the absence of any notice-of-claim provision* is not a deficiency requiring the importation of such statutes into the federal civil rights scheme." (emphasis added)).
255. *Id.* at 137.
256. *Id.* at 138.
257. *Id.* at 151.
258. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[T]he outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").
259. *Felder*, 487 U.S. at 151.
260. *See id.* at 152. ("Wisconsin, however, may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules . . . .").

courts to apply their own procedure when adjudicating federal claims.[261]

f. Johnson v. Fankell – 1997

After *Felder*, the Supreme Court returned to using only the internal-source theory in *Howlett*.[262] The brief clarity accompanying such a decisive decision was, unfortunately, short lived. Seven years after *Howlett*, the Court decided *Johnson v. Fankell*[263] and reintroduced the external-source theory back into Reverse-*Erie* jurisprudence by issuing an opinion relying on both the internal- and external-source theories. Recall that in *Johnson*, the substantive claim involved a Section 1983 action brought by a liquor store clerk in Idaho against her former employers, claiming a deprivation of her Fourteenth Amendment Due Process rights.[264] The clerk's employers filed a motion for qualified immunity.[265] When their motion was denied, they appealed, treating the denial as an appealable final judgment.[266] Had the suit been brought in federal court, this would have been appropriate.[267] However, under Idaho state procedure, a denial of a qualified immunity defense is not considered an appealable final decision.[268] Thus, the Idaho Supreme Court dismissed the appeal.[269] The United States Supreme Court upheld the dismissal.[270] While this decision is notable for its limitation on the intrusion of federal procedure in state court adjudications, its reasoning reveals that the external-source theory survived its brief abandonment in *Howlett*.

The Court supplied two lines of reasoning in *Howlett*. Addressing the internal-source theory first, the Court looked for the source of the federal procedure. As the source of the procedure was in Section 1291, a different statute, the state was under no obligation to enforce it.[271] Intriguingly, however, the Court supplied a second reason for its decision.

261. The dissent viewed this as a substantial problem with the Court's decision. *See id.* at 161 (O'Connor, J., dissenting) ("[The Court's] suggestion seems to be based on a sort of upside-down theory of federalism . . . .").
262. *See* text accompanying the discussion of *Howlett*, *supra* Part III.B.1.c.
263. 520 U.S. 911 (1997).
264. *Id.* at 913.
265. *Id.*
266. *Id.*
267. *See* Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (holding that a federal court's rejection of a qualified immunity defense is an immediately appealable final decision under 28 U.S.C. § 1291 (2012)).
268. *Johnson*, 520 U.S. at 914.
269. *Id.*
270. *Id.*
271. *Johnson*, 520 U.S. at 921.

In the second part of its opinion, the Court applied the outcome-determinative test introduced in *Felder* and, by doing so, the validity of the external-source theory. Interpreting the outcome-determinative test of *Felder* as requiring the imposition of federal procedure in all cases, petitioners argued that the federal procedure should apply in this case.[272] The Court, despite acknowledging that the outcome of petitioners motion would have come out differently in federal court, rejected petitioner's specific argument.[273] But, in doing so, the Court was not abandoning the outcome-determinative test—it was simply clarifying it. This test, the Court explained, is not triggered when just *any* decision comes out differently in state court. Rather, "outcome, as [the Court] used the term [in *Felder*], referred [only] to the *ultimate disposition* of the case."[274]

Following this explanation, the Court inserted a safety valve into its Reverse-*Erie* jurisprudence. Finding that "countervailing considerations" weighed too strongly against the application of federal procedure in state court, the Court stated that its "respect [for principles of federalism] is at its apex when [it] confront[s] a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts."[275] Reticent to require the state court to completely change its procedural systems, the Court signaled that its Reverse-*Erie* jurisprudence should take into consideration the degree of disruption in state court.

The fact that, in *Howlett*, the Court allowed Idaho's state procedure to govern does not mean that the external-source theory—or Reverse-*Erie* generally—is no longer as robust as it once was. It is important to remember that the external-source theory is not black and white; it represents a balancing test.[276] It is to be expected, then, that from time to time the Court will refrain from imposing federal procedure—a fact that makes the ultimate disposition of the case the least important part of it. What *is* important is that the Court's reference to *Felder's* outcome-determinative theory reveals that it is still willing to entertain external-source theory reasoning.

4. Summary of External-Source Theory

Like its internal counterpart, the external-source theory has

272. *Id.* at 918.
273. *Id.* at 915.
274. *Id.* at 921 (emphasis added).
275. *Id.* at 922.
276. *See, e.g.*, Chen, *supra* note 2, at 1447 (explaining the Court's "balancing [of] the competing sovereign interests, a technique not used in *Brown*").

survived since 1915. Unlike the internal-source theory, which has remained largely the same since *Central Vermont*, the external-source theory has grown and brought new and different principles under its umbrella. At its very essence, the external-source theory is a broad interest-balancing test weighted towards keeping federal substantive and procedural rights together. In this balancing test, the Court weighs conflict pre-emption, conflict-of-law, and outcome determinative theories, the federal and state interests involved, and the degree of disruption pre-emption would cause. With respect to pre-emption, the Court is willing to look outside the four corners of the substantive claim involved to find the procedure. Regarding conflict-of-law principles, the Court is willing, and in fact sometimes eager, to reclassify seemingly procedural rules as substantive. And the Court has recently reaffirmed its acceptance of an outcome-determinative approach to Reverse-*Erie*, under which the Court is likely to pre-empt any state rule that would lead to different results in different courts. When the Court weighs federal interests, it heavily weighs a desire for procedural uniformity. But the Court has also expressed concern when imposing federal procedures that would require a state to significantly restructure its procedural systems. Even so, under the external-source theory, the Court is much less concerned with principles of federalism and is more willing to assert federal dominance than it is under the internal-source theory.

IV. THE ANSWER

This overview of Reverse-*Erie* reveals a potentially unsatisfying conclusion. The question posed by this Note asks which set of procedural rules—federal or state—must apply in an Alaska state court adjudication of a federal substantive claim when Congress, the Constitution, and the Courts have not spoken. Unfortunately, there is no single, clear answer. Even so, it is unlikely that the Supreme Court will impose the new federal plausibility pleading standard from *Bell Atlantic Co. v. Twombly*[277] and *Ashcroft v. Iqbal*[278] onto state courts. Such a move would likely upset the federal/state balance too much.

The Court would be unlikely to pre-empt notice pleading in state court under the internal-source theory. To justify such an action the Court would have to find an explicit pro-defendant purpose behind the federal substantive claim. Lacking such a purpose, the Court would be reticent to reclassify the pleading procedure as a substantive right and

277. 550 U.S. 544 (2007).
278. 556 U.S. 662 (2009).

therefore would not pre-empt the state pleading standard.

While the Court might be more inclined to pre-empt a state's notice pleading regime under the external-source theory, it is still unlikely to do so. The key reason for this is the defendant's ability to remove a case to federal court. Should a defendant feel disadvantaged by how easily a plaintiff could bring a suit against him, he can remove the case to federal court and take advantage of its heightened pleading standard.[279] This ability provides a compelling and practical reason for the Court to avoid pre-empting Alaska's pleading standard.

That said, it is theoretically possible to justify such pre-emption. Because *Iqbal*'s plausibility standard increases a plaintiff's burden for getting into federal court, as compared to Alaska's notice pleading standard, the state's policy broadly swings pro-plaintiff and the federal policy swings pro-defendant. But as Justice O'Connor put it, "it should follow [from Reverse-*Erie*] that defendants, as well as plaintiffs, are entitled to the benefit of all federal court procedural rules that are 'outcome determinative.'"[280] Taking this position seriously could allow the Court to impose the federal pro-defendant pleading policy on states, like Alaska, that would otherwise favor plaintiffs.[281]

For now, Alaska and the other notice pleading states can breathe easy. While the possibility exists they will be forced to change their pleading standards, the probability—and in fact the plausibility—of such a ruling is very low. Of course, if any state has a *desire* to change its procedure, it may do so even without a Supreme Court mandate.[282]

279. *See* Chen, *supra* note 2, at 1450 ("The ability to remove federal cases significantly reduces forum-shopping opportunities.").

280. Felder v. Casey, 487 U.S. 131, 161 (1988) (O'Connor, J., dissenting).

281. An example of a similar situation would be a possible implication of Federal Rule of Civil Procedure 9(b), which applies a heightened "particularity" standard on federal plaintiffs pleading fraud or mistake. FED. R. CIV. P. 9(b). If a state let plaintiffs plead fraud or mistake according to *Conley*'s pro-plaintiff "no set of facts" standard, in the face of Rule 9(b)'s pro-defendant heightened pleading standard, could the Supreme Court force the state to adopt Rule 9(b) to protect its pro-defendant pleading policy? It seems the answer to this question should be the same as the answer to whether the Court could force the state to adopt the *Twombly* and *Iqbal* standard, which this Note addresses.

282. Although outside the purview of this Note, those interested in the benefits and pitfalls of voluntary adoption of the federal pleading standard should look to Carl Tobias's discussion of the Arizona Supreme Court's recent decision to adopt some of the Federal Rules. Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615 (2002).

CONCLUSION

For the last century, the Reverse-*Erie* doctrine has hidden in the shadows of *Erie* and other monolithic constitutional doctrines. Now, as states are starting to assert their own local procedural dominance, Reverse-*Erie* has a chance to stand again in the light of day. The advent of plausibility pleading has presented courts across the nation with an opportunity to re-examine their own pleading standards and procedural systems. More importantly, it has provided the Supreme Court an opportunity to apply Reverse-*Erie* to one of the most essential aspects of civil procedure: pleading standards.

This Note has demonstrated how the twin theories within Reverse-*Erie* have guided Supreme Court jurisprudence throughout the Twentieth Century. As these theories have competed for prominence, they have displayed the differing opinions on federalism that exist on the Supreme Court. Because no definitive decision has been rendered, there remains ample room for debate on how these theories should be applied in the future. Whether one of these theories will someday stand vindicated, the other denigrated as a backwards approach to a bygone era of federalism, remains to be seen.