Essay

Converse-*Erie*: The Key to Federalism in an Increasingly Administrative State

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Introduction

The case of *Erie Railroad Co. v. Tompkins*[1] and the doctrine that it spawned are ubiquitous in civil procedure and federal courts courses[2] and critical to almost any choice-of-law analysis. Indeed, the *Erie* doctrine is "commonly understood to embrace all situations in which a federal court must choose between federal or state law."[3] But this doctrine is far more than a choice-of-law methodology; in the words of the second Justice Harlan, it stands as "one of the modern cornerstones of our federalism."[4]

As central as the *Erie* doctrine may be to law school curricula and choice-of-law analyses, however, it represents only part of a federalism analysis; indeed, one scholar has likened traditional *Erie* doctrine to a false front on a movie set.[5] The other part of the analysis is the

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1 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2 *See* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 50–54 (2006).

3 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).

4 Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

5 Clermont, *supra* note 2, at 2.

extent to which federal law is applicable in state courts, which is explained by a doctrine known as "converse-*Erie*."[6]

Despite the significance of the converse-*Erie* doctrine, it has gone largely and surprisingly uncommented upon,[7] and when it has been discussed it has been largely mischaracterized or misapplied.[8] Moreover, many commentators limit their analyses of converse-*Erie* to discussions of preemption,[9] the Supremacy Clause,[10] and the related but distinct doctrine of *Testa v. Katt*.[11] Although preemption and the Supremacy Clause provide a natural and helpful starting point for converse-*Erie* analysis, these doctrines typically focus on the displacement of state *substantive* law with federal *substantive* law. Converse-*Erie*, however, addresses a wholly distinct question: the extent to which state courts, in the adjudication of substantive federal rights, must use federal *procedures* in lieu of state *procedures*.[12]

Of course, if federal law mandates that state courts employ federal procedures in the adjudication of a given federal right, the analysis is simple and the Supremacy Clause dictates that such procedures be used.[13] The more important and less clear situation is that in which

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6 This doctrine is also referred to by scholars as "reverse-*Erie*," *e.g.*, *id.*, or "inverse-*Erie*," *e.g.*, Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 941 n.10, 963 n.76 (1988).

7 *See* Clermont, *supra* note 2, at 2 & n.5. The first article to note and describe the converse-*Erie* phenomenon, Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the* Erie *Problem?*, 17 OHIO ST. L.J. 384 (1956), was not written until 1956, and relatively few commentaries devoted significant analysis to this new doctrine prior to Kevin M. Clermont's thorough analysis, published in 2006. *See* Clermont, *supra* note 2.

8 *Id.* at 2; *see, e.g.*, Shelly F. Spansel, Comment, Robins Dry Dock *Versus State Laws Governing Liability for Pure Economic Loss: How the Maritime Circuit Should Resolve the Preemption Conflict*, 51 LOY. L. REV. 165, 176 n.60 (2005) (describing reverse-*Erie* as a "doctrine [that] requires state courts, when adjudicating a maritime case, to apply the applicable substantive maritime law rather than state law").

9 *See, e.g.*, Peter Thompson, *State Courts and State Law: A New Force in Admiralty?*, 8 U.S.F. MAR. L.J. 223, 230–32 (1996).

10 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) (describing reverse-*Erie* cases as "simply an extension of the supremacy line of cases" and indistinguishable from both supremacy and preemption cases).

11 Testa v. Katt, 330 U.S. 386 (1947); *see, e.g.*, Reza Dibadj, *From Incongruity to Cooperative Federalism*, 40 U.S.F. L. REV. 845, 874 (2006) (referring to the "reverse-*Erie* principle, as articulated by the United States Supreme Court in *Testa v. Katt*").

12 *See* 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).

13 *See Ex parte* Siebold, 100 U.S. 371, 392–93 (1879) (noting the supremacy of federal law over state law); *see also Testa*, 330 U.S. at 390–91 (stating that, because of the supremacy of federal law, the policy of a federal law is the policy of every state, and a state cannot refuse to comply with the mandates of federal law).

federal law is silent as to the procedures to be used in the adjudication of a federal right. In such a case, the question arises as to which procedures—federal or state—a state court must use. Perhaps even more important is the question of which procedures the court *should* use. The case law addressing this question is woefully unclear, and two broad schools of thought have developed. The first, as articulated by Professor Martin H. Redish and Steven G. Sklaver, argues that there should be "a strong presumption in favor of the use of federal procedures when a state court is called upon to adjudicate a federal cause of action" to "assure the attainment of federal supremacy in the enforcement and protection of federal claims."[14] The second takes as its starting point the longstanding general rule that "federal law takes the state courts as it finds them"[15] and posits that "state courts are not obligated to follow federal procedural rules so long as the state procedures do not unduly burden the federal rights."[16] Accordingly, supporters of this approach would engage in an *Erie*-like balancing of state and federal interests to determine the applicable law.[17]

The debate over which approach to use in the converse-*Erie* context assumes a tremendous importance today, with the rise of the administrative and regulatory state[18] and the proliferation of federal rights and causes of action, many of which are ultimately adjudicated in state courts. The recent U.S. Supreme Court case of *Schaffer v. Weast*[19] is a perfect example of a situation in which the converse-*Erie* doctrine is directly applicable, and it is particularly noteworthy because the Court applied a default federal procedural rule without even considering the converse-*Erie* doctrine or the considerations that underlie it. Moreover, the 2005 decision by the Eleventh Circuit in *Legal Environmental Assistance Foundation, Inc. v. U.S. EPA*[20] demonstrates that converse-*Erie* concerns are not limited to actions in state courts, but must be confronted by federal courts as well.

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14 Redish & Sklaver, *supra* note 12, at 105.

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

16 ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.5 (4th ed. 2003).

17 *See* Clermont, *supra* note 2, at 14, 43.

18 *See, e.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century . . . ."). *See generally* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994).

19 Schaffer v. Weast, 546 U.S. 49 (2005).

20 Legal Envtl. Assistance Found., Inc. v. U.S. EPA, 400 F.3d 1278 (11th Cir. 2005).

This Essay examines the oft-neglected converse-*Erie* doctrine, ultimately concluding that in order to further the principles of cooperative federalism—"Our Federalism"[21]—and comity that underlie our constitutional system, courts must recognize situations that call for converse-*Erie* analysis and apply the doctrine in a manner reflective of the limited role of the federal government. Accordingly, federal procedural rules should apply to federal programs delegated to and implemented by state agencies only when absolutely necessary to avoid undermining a strong federal policy, and in the absence of a specific mandate or such a finding, courts should apply state law to fill the interstices of federal statutory schemes. In conducting their analyses, courts should employ *Erie*-like balancing to determine when the application of federal procedures is necessary.

To provide the foundation for the analysis to follow, Part I of this Essay briefly reviews the *Erie* doctrine and its effect as a choice-of-law methodology. It then introduces and describes the converse-*Erie* doctrine and reviews the seminal cases in which the doctrine was developed. Part II examines the Supreme Court's decision in *Schaffer*, in which the Court failed to address the clear converse-*Erie* issue, and the Eleventh Circuit's decision in *Legal Environmental Assistance Foundation*, which illustrates the applicability of converse-*Erie* principles in federal court. Part III discusses the importance of the converse-*Erie* doctrine to principles of federalism and our constitutional system and argues that to strike the proper balance between federal and state law in the converse-*Erie* context, courts should adopt an approach that carefully balances state and federal interests and applies federal procedures only when absolutely necessary to avoid unduly burdening a federal right.

*I. Development of the Converse-*Erie *Doctrine*

A. The Erie *Doctrine and Federal Common Law*

To understand converse-*Erie*, it is first necessary to briefly return to *Erie* itself.[22] In short, the *Erie* doctrine—the cornerstone of analy-

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21 *See* Younger v. Harris, 401 U.S. 37, 44–45 (1971) (noting the great importance of this concept, which provides that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States").

22 Unsurprisingly, the problem of converse-*Erie*, like that of *Erie*, predates the case from which it takes its name. Clermont, *supra* note 2, at 23; *see, e.g.*, Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

sis of the relationship between federal and state law in federal courts—provides that federal courts, except in matters governed by the Constitution or federal statutes, shall apply the substantive law of the forum state.[23] In so holding, the Supreme Court overturned the previous rule of *Swift v. Tyson*,[24] rejecting the notion of a "federal general common law" to which federal courts had previously looked to find the applicable rule of decision.[25]

Importantly, *Erie* did not portend the end of federal common law, but rather the natural law concept of a "federal *general* common law."[26] In the words of Justice Holmes, "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."[27] Accordingly, in cases following *Erie*, federal courts continue to create federal common law and apply it to the cases before them.[28] Since *Erie*, the Supreme Court has indicated four distinct situations in which federal courts may create federal common law: (1) cases involving the rights and duties of the United States;[29] (2) cases involving uniquely federal inter-

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23 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). A comprehensive examination and analysis of the *Erie* doctrine is beyond the scope of this Essay. For a thorough examination of the doctrine, see generally, for example, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

24 Swift v. Tyson, 41 U.S. (1 Pet.) 1 (1842).

25 *Erie*, 304 U.S. at 78. Subsequent decisions have refined the Court's analysis in *Erie*. With regard to substantive state laws, the Court has held that state law should be applied only if outcome determinative, *see* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945), with outcome determination viewed in light of *Erie*'s twin aims of avoiding forum-shopping and the inequitable administration of the laws, Walker v. Armco Steel Corp., 446 U.S. 740, 747 (1980) (citing Hanna v. Plumer, 380 U.S. 460, 468 (1965)), but that state law might not be applied if there is a sufficient countervailing federal interest, *see* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536–39 (1958). With regard to rules of procedure, the Court has held that if a federal statute dictating procedure conflicts with a state rule of procedure, the federal statute will preempt the state rule, *see* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988), and a federal rule of procedure will displace a state rule if the federal rule is consistent with the federal Rules Enabling Act, 28 U.S.C. § 2072 (2000), Hanna v. Plumer, 380 U.S. 460, 463–64 (1965); *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (holding that a rule is procedural if it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them").

26 *Erie*, 304 U.S. at 78 (emphasis added).

27 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), *partially superseded by statute on other grounds*, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (2000).

28 Indeed, on the same day that the Supreme Court announced its opinion in *Erie*, it decided *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), in which it created and applied federal common law to determine whether the water of an interstate stream must be apportioned between neighboring states. *See id.* at 110.

29 United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) ("This Court has consistently held that federal law governs questions involving the rights of the United States arising

ests in which "a 'significant conflict' exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation";[30] (3) when a statute expressly instructs federal courts to create federal common law;[31] and (4) when a statute implicitly directs courts to create federal common law.[32]

This ability of, and in fact direction to, federal courts to create and apply federal common law to supplement federal statutory law assumes a great importance in the converse-*Erie* context, especially in light of the Supreme Court's holding in *Hanna v. Plumer*[33] that federal-court-created procedural rules may displace state rules.[34] Thus, even if a federal statute is not on point, state law may nevertheless be forced to yield to federal procedures. The question of when state courts must yield to and apply federal procedures in the adjudication of federal rights is the subject of the converse-*Erie* doctrine.

B. The Converse-Erie *Doctrine*

Whereas *Erie* deals with the applicability of state substantive law in federal courts, converse-*Erie* addresses precisely the opposite question: when do federal laws and rules apply in state courts? Of course, in the case of federal substantive laws, the answer is clear: federal law preempts state law pursuant to the Supremacy Clause, and the converse-*Erie* doctrine is not implicated.[35]

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under nationwide federal programs."); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) ("The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." (internal citations omitted)).

30 Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) (alteration in original) (internal citations and quotation marks omitted).

31 *E.g.*, FED. R. EVID. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

32 *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456–57 (1957) (explaining that, in "the penumbra of express statutory mandates" where "express statutory sanction" is lacking, courts must "fashion[ ] a remedy to effectuate [federal] policy"). The Constitution itself may provide such implicit instructions. *See, e.g.*, *S. Pac. Co.*, 244 U.S. at 214–15 (holding that the admiralty jurisdiction clause of the Constitution, U.S. CONST. art. III, § 2, provides implicit authority for federal courts to create federal common law).

33 Hanna v. Plumer, 380 U.S. 460 (1965).

34 *See id.* at 463–64, 473–74 (holding that the Federal Rules of Civil Procedure, not state law, governed the method for service of process in federal courts).

35 *See supra* note 13.

The converse-*Erie* situation arises when the federal law that may potentially be applied is procedural. Within this context, two distinct types of cases are possible. First, federal law—whether constitutional, statutory, or common law in origin—may require that state courts adopt specific procedures when adjudicating a federal right.[36] In this first situation, the analysis is simple and straightforward. The state court must apply the federally mandated procedures, as the federal law would supercede and displace the state law and procedures.[37] The second situation in which converse-*Erie* doctrine is implicated is that in which the federal law governing a federal substantive right does not indicate the procedures to be used in the adjudication of that right.[38] In these circumstances, the question becomes to what extent—if at all—federal procedures must displace state procedures.[39]

Although case law does not provide a clear answer to this second question, two converse-*Erie* philosophies have developed. The first is "a standard that will assure the attainment of federal supremacy in the enforcement and protection of federal claims. Such a standard would dictate a strong presumption in favor of the use of federal procedures when a state court is called upon to adjudicate a federal cause of action."[40] This view of converse-*Erie* analysis places the primary importance on the federal right involved, employing federal procedures to ensure "the effective enforcement of federal substantive law."[41]

The second view of converse-*Erie* analysis focuses primarily on concerns of federalism. This view, as discussed by Professor Henry Hart in 1954, takes as its starting point "[t]he 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."[42] Thus, federal law may impose federal procedures upon state courts

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36 Redish & Sklaver, *supra* note 12, at 100.

37 *Id.* at 100–01; *see also supra* note 13.

38 Redish & Sklaver, *supra* note 12, at 100.

39 *Id.* at 101. It is clear that state courts may not always employ their own procedures when adjudicating federal rights. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 141 (1988) (holding that state procedure cannot apply when it "burdens the exercise of [a] federal right" in such a way that is "inconsistent in both design and effect with the . . . aims" of a federal law), *partially superseded by statute on other grounds*, 42 U.S.C. § 1997e(a) (2000), *as recognized in* Higgason v. Stogsdill, 818 N.E.2d 486, 489 (Ind. Ct. App. 2004); *see also* CHEMERINSKY, *supra* note 16, § 3.5 (noting that state courts must follow federal procedures if state procedures would "unduly burden" federal rights).

40 Redish & Sklaver, *supra* note 12, at 105.

41 *Id.* at 106.

42 Hart, *supra* note 15, at 508.

only to avoid the frustration of a congressional remedial purpose.[43] The fact that "[s]ome differences in remedy and procedure are inescapable" is viewed as an acceptable consequence because this is necessary "if the different governments are to retain a measure of independence in deciding how justice should be administered."[44]

Importantly, although the converse-*Erie* doctrine directly applies when state courts adjudicate federal rights, the considerations underlying the doctrine are not limited to this context. Because the doctrine fundamentally governs the relationship between the states and the federal government, federal courts must grapple with the converse-*Erie* doctrine when state procedures are challenged in federal court.[45] In such a case, the federal court must consider the extent to which state procedures are compatible with the federal right asserted, thereby engaging in precisely the same analysis that confronts a state court in the converse-*Erie* context.[46] Moreover, a federal court may also confront the converse-*Erie* doctrine in an additional context—one step further removed. If federal law incorporates state law, a federal court must determine if that state law is consistent with the asserted federal right and can therefore be incorporated, or if, due to incompatibility as determined by a converse-*Erie* analysis, the court must instead apply or create federal procedures to apply to the assertion of the federal right.

C. Converse-Erie *in Action*

The Supreme Court's 1952 decision in *Dice v. Akron, Canton & Youngstown Railroad Co.*[47] stands as perhaps the clearest example of the application of the converse-*Erie* doctrine. In *Dice*, the plaintiff, an injured railroad fireman, brought an action under the Federal Employers' Liability Act ("FELA")[48] in Ohio state court, arguing that his injuries were caused by the railroad's negligence.[49] The railroad's primary defense was a liability waiver signed by the plaintiff.[50] The

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43 Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 18 (1999) (citing Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431, 437 (1992)).

44 *See* Hart, *supra* note 15, at 508.

45 This is precisely the situation in *Legal Environmental Assistance Foundation, Inc. v. U.S. EPA*, 400 F.3d 1278 (11th Cir. 2005). *See infra* Part II.B.

46 *See supra* note 39.

47 Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952).

48 Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (2000).

49 *Dice*, 342 U.S. at 360.

50 *Id.*

plaintiff alleged that the waiver was void because the defendant fraudulently induced him to sign it.[51] Judgment notwithstanding the verdict was entered for the defendant, reversed on appeal, and subsequently reinstated by the Ohio Supreme Court, which held that Ohio law governed, that under Ohio law the plaintiff was bound by the waiver, and that all factual issues relating to the alleged fraud were to be decided by the judge rather than the jury.[52] The U.S. Supreme Court ultimately reversed the Ohio Supreme Court, holding that the more plaintiff-friendly federal law governed the validity of releases under the FELA,[53] and that all factual issues related to fraud must be decided by a jury rather than a judge because "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used."[54] In so ruling, it appeared that the U.S. Supreme Court adopted the view later advocated by Redish and Sklaver, holding that federal law governed what appeared to be clearly a matter of procedure—by whom an issue was to be decided—on the ground that it was "too substantial a part of the rights accorded by the Act."[55] The emphasis was clearly placed on the supremacy of the federal right.

Indeed, earlier FELA cases decided by the Court support this understanding of the converse-*Erie* doctrine. In a series of cases beginning as early as 1915, the Court demonstrated a consistent willingness to reclassify such seemingly clearly procedural matters as the burden of proof as substantive rather than procedural,[56] and to displace state pleading requirements in favor of federal procedures.[57] In so doing, the Court cited not the text of a federal statute, but rather Congress's broad remedial purpose in enacting the FELA[58] and a desire for "uniformity in adjudication of federally created rights."[59] As explained by the Court in *Brown v. Western Railway of Alabama*,[60] state procedures "cannot be used to impose unnecessary burdens upon rights of recov-

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51 *See id.*

52 *Id.* at 360–61.

53 *Id.* at 361.

54 *Id.* at 363 (citing Brown v. W. Ry. of Ala., 338 U.S. 294 (1949)).

55 *Id.* at 363.

56 New Orleans & Ne. R.R. Co. v. Harris, 247 U.S. 367, 372 (1918); *see* Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 512 (1915).

57 *See* Brown v. W. Ry. of Ala., 338 U.S. 294, 298–99 (1949).

58 *See White*, 238 U.S. at 512.

59 *Brown*, 338 U.S. at 299.

60 Brown v. W. Ry. of Ala., 338 U.S. 294 (1949).

ery authorized by federal laws."[61] Perhaps the strongest statement of the primacy-of-federal-law view, however, came in the Court's 1942 decision in *Garrett v. Moore-McCormack Co.*,[62] in which the Court explained:

> If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.[63]

Despite this apparently clear preference for the use of federal procedures over state procedures in the adjudication of federal rights, recent civil rights actions brought under 42 U.S.C. § 1983[64] lend support to the federalist view that "state courts are not obligated to follow federal procedural rules so long as the state procedures do not unduly burden the federal rights."[65] In the 1988 case of *Felder v. Casey*,[66] the plaintiff, who had been arrested by Milwaukee police officers, brought a civil rights lawsuit alleging a racially motivated beating against the City of Milwaukee and various police officers in Wisconsin state court.[67] The police officers moved to dismiss the action on the ground that the plaintiff failed to comply with Wisconsin's notice-of-claim statute.[68] The defendant-officers prevailed in state court, but the U.S. Supreme Court ultimately reversed, finding that the Wisconsin notice-of-claim statute conflicted with the essence of the federal right and therefore could not apply to the § 1983 claim.[69]

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61 *Id.* at 298.

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

63 *Id.* at 245.

64 42 U.S.C. § 1983 (2000).

65 CHEMERINSKY, *supra* note 16, § 3.5; *see also supra* note 43 and accompanying text.

66 Felder v. Casey, 487 U.S. 131 (1988), *partially superseded by statute*, 42 U.S.C. § 1997e(a) (2000), *as recognized in* Higgason v. Stogsdill, 818 N.E.2d 486, 489 (Ind. Ct. App. 2004).

67 *Id.* at 135.

68 *Id.* at 135–36. The Wisconsin notice-of-claim statute "provides that no action may be brought or maintained against any state governmental subdivision, agency, or officer unless the claimant either provides written notice of the claim within 120 days of the alleged injury, or demonstrates that the relevant subdivision, agency, or officer had actual notice of the claim and was not prejudiced by the lack of written notice." *Id.* at 136; *see* WIS. STAT. ANN. § 893.80 (West 2006).

69 *Felder*, 487 U.S. at 138.

In reaching this conclusion, however, the Court noted "the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."[70] Key to the Court's holding was its finding that the notice-of-claim statute is not "a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority."[71] As such, the Court held that because the state statute was outcome-determinative, principles of federalism dictated that it must give way to the asserted federal right.[72]

Felder thus suggests that deference to state procedures is proper until a state procedure crosses some boundary and infringes upon an asserted federal right. The determination of where this boundary lies—although not explicitly made by the Court in *Felder*—necessarily involves a balancing of state and federal interests, a conflict which is itself at the heart of a converse-*Erie* analysis that seeks to protect states' rights and federalist balance that are central to our constitutional system.

This approach gains further support from the Supreme Court's decision in *Howlett v. Rose*,[73] another case brought under § 1983. Although the Court ultimately struck Florida's sovereign immunity defense as effectively nullifying § 1983,[74] it expressly quoted Professor Hart's article in holding that "[t]he general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'"[75] The Court continued: "The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law."[76] Of critical importance, the Court noted that "[t]hese principles are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law."[77]

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70 *Id.*

71 *Id.* at 141.

72 *Id.* at 151.

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

74 *See id.* at 383.

75 *Id.* at 372 (quoting Hart, *supra* note 15, at 508); *see also supra* note 42 and accompanying text.

76 *Howlett*, 496 U.S. at 372 (internal citations omitted).

77 *Id.* at 372–73.

Although the Court did not establish a bright-line rule, these considerations—which directly implicate converse-*Erie* (despite the Court's lack of acknowledgement of the doctrine)—show that the Court is apparently unwilling to blindly force state courts to adopt all federal procedures when adjudicating federal rights. The stage thus appeared set for the Court to build upon its holdings and explicate a clear doctrine. This chance was clearly presented by the 2005 case of *Schaffer v. Weast*,[78] but the Court, almost inexplicably, ignored the converse-*Erie* doctrine altogether in reaching its decision.

The next Part of this Essay examines *Schaffer*, along with the Eleventh Circuit's *Legal Environmental Assistance Foundation* case, to assess the current state of the converse-*Erie* doctrine and illustrate the applicability of the considerations underlying the doctrine in federal court as well. Part III then assesses the importance of the converse-*Erie* doctrine, explaining its crucial importance to our federalist system and advocating an interpretation of the doctrine consistent with the federalist design of our constitutional system.

II. Recent (Non)Developments in the Doctrine: Schaffer *and* Legal Environmental Assistance Foundation

A. Schaffer v. Weast

In *Shaffer v. Weast*, the U.S. Supreme Court was squarely confronted with a converse-*Erie* situation. The issue in the case involved the application of the Individuals with Disabilities Education Act ("IDEA" or "the Act"),[79] which the Court described as "a model of cooperative federalism."[80] As noted by the Court, the Act "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility."[81] To receive federal funding under the IDEA, school districts must create an "individualized education program" ("IEP") for each disabled child.[82] Each IEP must assess the child's academic performance, establish measurable academic goals, and state the nature of the services the school is to provide.[83] If the child's parents are not satisfied with an IEP, the Act gives them the right to seek an ad-

78 Schaffer v. Weast, 546 U.S. 49 (2005).

79 Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2000).

80 *Schaffer*, 546 U.S. at 52 (internal citation and quotation marks omitted).

81 *Id.* (internal quotation marks omitted).

82 *Id.* at 51 (citing 20 U.S.C. § 1414(d)).

83 *Id.* at 53 (citing 20 U.S.C. § 1414(d)(1)(A)).

ministrative "impartial due process hearing."[84] Although the states are given limited discretion to select who presides over this type of hearing, the Act specifies the central aspects of the hearing.[85] The Act does not, however, provide which party should bear the burden of proof at such a hearing.[86]

In 1997, the parents of Plaintiff Brian Schaffer, a student suffering from learning disabilities as well as speech and language impairments, contacted the Montgomery County (Maryland) Public Schools System seeking an IEP for their son.[87] The school system complied, offering the Schaffers two potential placements, but the parents, believing Brian required smaller classes and more intensive services than those offered, initiated a due process hearing as provided by the IDEA.[88] The Administrative Law Judge ("ALJ") who presided over the hearing[89] deemed the evidence to be close and, holding that the parents bore the burden of persuasion, ruled in favor of the school district.[90] The Schaffers appealed, and the District Court reversed, finding the burden of persuasion properly to be on the defendant-school district.[91] On reconsideration, the ALJ found for the parents. The school district appealed, and the Fourth Circuit reversed, finding no reason "to 'depart from the normal rule of allocating the burden to the party seeking relief.'"[92]

The Supreme Court affirmed the Fourth Circuit without engaging in an analysis even resembling that common to the Court's previous converse-*Erie* cases.[93] Rather, the Court limited its inquiry to the statute itself, noting that because the IDEA is silent as to which party bears the burden of persuasion, the Court would "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[94] The Court then analogized to other cases in which it "assumed without comment that plaintiffs bear the burden of persuasion

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84 *Id.* (quoting 20 U.S.C. § 1415(f)). School districts may also seek such a hearing. *Id.*

85 *Id.* at 54 (citing 20 U.S.C. § 1415(f)(1)).

86 *Id.*

87 *Id.*

88 *Id.* at 54–55.

89 In Maryland, IEP hearings are presided over by ALJs. MD. CODE. ANN., EDUC. § 8-413(d)(5) (LexisNexis 2006).

90 *Schaffer*, 546 U.S. at 55.

91 *Id.*

92 *Id.* (quoting Weast v. Schaffer, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd*, 546 U.S. 49 (2005)).

93 *See id.* at 56–62.

94 *Id.* at 56.

regarding the essential aspects of their claims."[95] Notably, the Court cited to cases involving Title VII of the Civil Rights Act of 1964,[96] the Americans with Disabilities Act,[97] federal standing,[98] the First Amendment,[99] and equal protection[100]—all of which are distinctly *federal*. Although the IDEA is itself a federal law, the Act delegates to state authorities the "responsibility generally for establishing fair hearing procedures."[101] Because the federal statute did not specify who bears the burden of persuasion at the "due process" hearings, then, presumably this was delegated to the states and state law should be incorporated to fill the interstices of the federal law and serve as the rule of decision.[102]

Using this reasoning, the defendant and several states, as amici, argued that states may override the federal default rule and place the burden of proof on the school district in all instances.[103] The Court, although expressly acknowledging that several States have laws that do just this,[104] refused to consider the issue, noting that Maryland has no such law or regulation.[105] It never sought to examine Maryland common law to see if it provided an answer to the question. Thus, the Court implicitly distinguished between statutory law and common law in a manner reminiscent of *Swift v. Tyson*,[106] which *Erie* specifically

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95 *See id.* at 57.

96 Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17 (2000); *see Schaffer*, 546 U.S. at 57 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

97 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000); *see Schaffer*, 546 U.S. at 57 (citing Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999)).

98 *See Schaffer*, 546 U.S. at 57 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

99 *See id.* (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

100 *See id.* (citing Hunt v. Cromartie, 526 U.S. 541, 553 (1999)).

101 *Id.* at 54 (citing 20 U.S.C. § 1415(a) (2000)).

102 *Cf.* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) ("Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. Otherwise, we have indicated that federal courts should incorporat[e] [state law] as the federal rule of decision, unless application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." (alteration in original) (internal citations and quotation marks omitted)).

103 *Schaffer*, 546 U.S. at 61.

104 *Id.* at 61 (citing such laws in Minnesota, Alabama, Alaska, and Delaware).

105 *Id.* at 61–62.

106 Swift v. Tyson, 41 U.S. (1 Pet.) 1, 12 (1842).

rejected,[107] and therefore never properly sought to incorporate a state law as the rule of decision.[108]

Justice Breyer vigorously dissented, arguing that because Congress did not itself decide who should bear the burden of persuasion, this matter should be left to the states.[109] He arrived at his conclusion by engaging in precisely the type of balancing for which the converse-*Erie* doctrine calls, observing that "[n]othing in the Act suggests a need to fill every interstice of the Act's remedial scheme with a uniform federal rule,"[110] and that, as such, it was proper to look to state law to answer questions unresolved by the Act.[111] Indeed, he noted that because the Act sought to foster, as the majority put it, "cooperative federalism,"[112] respecting the right of states to decide procedural matters was not only advisable but proper.[113] The fact that states had resolved the burden of persuasion question for themselves in different ways with no adverse consequences, he argued, exemplified this point.[114] Although Maryland had no statute or regulation on point, Justice Breyer concluded that the ALJ should look to the state's administrative laws and rules of procedure to determine who bore the burden of persuasion in this case.[115]

Whereas the majority opinion failed to even recognize the existence of a converse-*Erie* problem, Justice Breyer's dissent addressed the matter directly, his analysis adopting an approach to the doctrine that balances federal and state interests and respects the role of the states in the federal system. Indeed, his strong language seemed to forbid the possibility that, unless a state procedure significantly bur-

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107 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938).

108 *See supra* note 102 and accompanying text.

109 *See* Schaffer v. Weast, 546 U.S. 49, 69–71 (2005) (Breyer, J., dissenting) (internal quotation marks omitted).

110 *Id.* at 70.

111 *See id.* at 71.

112 *See supra* note 80 and accompanying text.

113 *See Schaffer*, 546 U.S. at 71 (Breyer, J., dissenting); *see also* Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 495 (2002) (noting that when interpreting statutes "designed to advance cooperative federalism . . ., we have not been reluctant to leave a range of permissible choices to the States").

114 *See Schaffer*, 546 U.S. at 70 (Breyer, J., dissenting). The school district bears the burden, by statute or regulation, in Alaska, Alabama, Connecticut, Delaware, the District of Columbia, and West Virginia; the moving party bears the burden by statute or regulation in Indiana and Kentucky; and the burden varies depending upon the remedy sought in Georgia and Minnesota. *Id.* (listing statutory references).

115 *Id.* at 71.

dened a federal right, federal procedure could apply merely to ensure that federal law is somehow "supreme."[116]

B. Legal Environmental Assistance Foundation, Inc. v. U.S. EPA

A potential converse-*Erie* issue likewise squarely confronted a federal court in *Legal Environmental Assistance Foundation, Inc. v. U.S. EPA*, providing an example of a situation in which an undeniably procedural state regulation was challenged by a party claiming to assert a federal right. *Legal Environmental Assistance Foundation* involved a challenge to Florida and Alabama state-run permit programs regulating emissions, enacted pursuant to Title V of the Clean Air Act ("CAA").[117] As provided by the CAA, these state-run programs must contain, *inter alia*, "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable [state] law."[118]

The case specifically arose from the challenge by the Legal Environmental Assistance Foundation ("LEAF") to the state-imposed standing requirements of the Title V programs run by Florida and Alabama. LEAF petitioned the EPA, which is vested with the authority to enforce the statutory and regulatory requirements of approved state programs,[119] for determinations of deficiency regarding each program, contending that Florida and Alabama's standing requirements, which limit judicial review of the permits to persons "adversely affected" or "aggrieved" by an administrative action, respectively, are too stringent.[120] In each case, the EPA denied LEAF's petitions, stat-

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116 *See id.* ("Indeed, in today's technologically and legally complex world, whether court decisions embody that kind of judicial respect [for congressional determinations to defer to state law] may represent the true test of federalist principle."); *cf.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 420 (1999) (Breyer, J., concurring in part and dissenting in part) ("[W]hen faced with [linguistic] ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority.").

117 Clean Air Act ("CAA"), tit. 5, 42 U.S.C. §§ 7661–7661f (2000). The CAA directs the EPA to promulgate regulations governing such programs and establish minimum requirements for them. Legal Envtl. Assistance Found., Inc. v. U.S. EPA, 400 F.3d 1278, 1279 (11th Cir. 2005) (citing 42 U.S.C. § 7661a(b)).

118 *Id.* at 1279–80 (citing 42 U.S.C. § 7661a(b)(6)). The EPA promulgated regulations incorporating this state judicial review requirement. *Id.* at 1280 (citing 40 C.F.R. § 70.4(b)(3)(x) (2007)). According to the statutory and regulatory regime, to obtain judicial review, a non-applicant, non-commenter must satisfy state standing requirements.

119 *Id.* at 1280 (citing 42 U.S.C. § 7661a(i)(1), (2), (4)).

120 *Id.* at 1280–81.

ing that the judicial review requirements comported with the standing requirements of Article III of the U.S. Constitution.[121]

LEAF petitioned the Eleventh Circuit for review of the EPA decisions. Although the court observed that "[i]f LEAF is aggrieved by a Title V permit action . . ., it is entitled to judicial review in the appropriate state court, *in accordance with that state's laws*"[122]—thus presenting, but not acknowledging, a situation clearly requiring a converse-*Erie* analysis to determine whether to apply state standing requirements or their federal counterparts—the court avoided such an analysis and denied LEAF's petition on the ground that the organization itself lacked Article III standing because it had not suffered an injury-in-fact.[123] LEAF's failure to satisfy this jurisdictional prerequisite thus foreclosed converse-*Erie* analysis.

*III. Constitutional Consequences: Converse-*Erie *in Light of* Schaffer *and* Legal Environmental Assistance Foundation

As the Supreme Court famously and presciently stated over three decades ago, underlying our system of government are notions of comity and respect for state functions that can best be described as simply "Our Federalism."[124] This concept does not call for blind adherence to states' rights, nor allow for complete control of important issues by the federal government and courts.[125] Rather, it describes a system

> in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[126]

The doctrine announced in *Erie* nearly seventy years ago during the heart of the New Deal[127] stands as a bulwark of this principle. *Erie*, however, tells only half of the story. *Erie* talks substance. But what of procedure?

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121 *Id.*

122 *Id.* at 1281 (emphasis added).

123 *Id.* at 1281–82.

124 *See supra* note 21 and accompanying text.

125 Younger v. Harris, 401 U.S. 37, 44 (1971).

126 *Id.*

127 *See supra* text accompanying note 23.

With the rise of the administrative and regulatory state, characterized by a proliferation of administrative agencies and the formation of countless joint federal-state programs such as those at the heart of *Schaffer* and *Legal Environmental Assistance Foundation*,[128] state courts will continue to assume a major role in adjudicating rights claimed under federal statutes. As a result, unhappy litigants, failing to prevail on the substance of their claims, will increasingly direct their attention to procedure, challenging those employed by state courts. State supreme courts, and possibly the United States Supreme Court, will then be forced to confront the question of which procedures—state or federal—to apply to the adjudication of these rights. This is the converse-*Erie* problem.

In deciding these issues, courts should heed the advice of the Supreme Court and "act with utmost caution before deciding that [a state court] is obligated to entertain [a] claim" when the state court has previously "refuse[d] jurisdiction because of a neutral state rule regarding the administration of the courts."[129] Moreover, courts—whether state or federal—should seek to determine the applicable procedures in a manner consistent with "the notion of 'comity,' that is, a proper respect for state functions";[130] in short, "Our Federalism." A reading of converse-*Erie* that emphasizes the primacy of federal law, such as that advanced by Redish and Sklaver,[131] necessarily runs counter to these interests. Although preemption certainly plays a role in converse-*Erie* and provides a useful starting point for the understanding and analysis of the doctrine, it is not the doctrine's end. Absent a substantial burden on a federal right, to simply decide that any conflict between state and federal procedures can justify preemption of the state procedures would be to advocate the end of our federalist system. Surely, such an outlook runs counter to the "model of cooperative federalism" that federal statutes like the IDEA are supposed to embody.[132]

On the contrary, an approach to converse-*Erie* that upholds the use of state procedures in the adjudication of federal rights unless such procedures undermine the rights themselves would ensure that federal rights are vindicated while respecting the distinct role of state courts in our constitutional, federal system. Such a view does not dis-

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128 *See supra* note 18.

129 Howlett v. Rose, 496 U.S. 356, 372 (1990).

130 *Younger*, 401 U.S. at 44.

131 *See supra* notes 40–41 and accompanying text.

132 *See supra* note 80 and accompanying text.

pute that if "a 'significant conflict' exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation,"[133] then even absent specific statutory guidance, federal procedures could be developed as a matter of federal common law and applied. If, however, state procedures do not undermine a federal right, there should be no concern that any congressional remedial purpose will be frustrated. The converse-*Erie* dilemma can be solved in a way that both vindicates federal rights and preserves our system's federalist balance.

Schaffer and *Legal Environmental Assistance Foundation* demonstrate, however, that the recognition of the converse-*Erie* situation and the ultimate application of the doctrine remain elusive. In *Schaffer*, a case in which the Supreme Court expressly and repeatedly noted the cooperative federalist nature of the statute at issue, the Court nonetheless blindly applied a default federal rule of procedure because there was no state *statute* to the contrary.[134] The Court did not look to state procedure to determine what it was and if it undermined the substantive federal right at issue. It did not look to state administrative law or practice. It did not engage in any analysis or balancing of state and federal interests. In short, it did not address converse-*Erie*. Seemingly only Justice Breyer, in dissent, recognized and accorded appropriate weight to the state interest at issue and called for an evaluation of the procedures to be employed under state law.[135] Similarly, in *Legal Environmental Assistance Foundation*, a federal court failed to reach the converse-*Erie* issue. In that case, the Eleventh Circuit dismissed the petition for lack of federal court standing, thereby completely avoiding making a decision as to whether the Florida and Alabama standing rules were acceptable or had to be displaced by federal procedures.

Conclusion

Despite the countless articles and analyses dedicated to the examination and explanation of the *Erie* doctrine, its near ubiquity in the conflicts-of-law field, and its recognition by the Supreme Court as "one of the modern cornerstones of our federalism,"[136] *Erie* represents only half of a complete federalism analysis. To fully compre-

133 *See supra* note 30 and accompanying text.

134 *See supra* notes 94–108 and accompanying text.

135 *See supra* notes 109–15 and accompanying text.

136 *See supra* note 4 and accompanying text.

hend the relationship between federal and state courts and the law and procedures they employ, one must address the less-appreciated and oft-neglected converse-*Erie* doctrine and the subject to which it is addressed: the extent to which state courts, in the adjudication of substantive federal rights, must use federal procedures in lieu of state procedures.[137] Although the current state of the doctrine is anything but clear, when viewed in light of the Supreme Court's express desire to foster federal-state comity and "Our Federalism," the solution to the converse-*Erie* question becomes strikingly clear. Courts should use the doctrine to advance, not hinder, our federalist constitutional system by upholding the use of state procedures in the adjudication of substantive federal rights in state courts unless such procedures would undermine the federal rights themselves. In an increasingly administrative and regulatory state characterized by cooperative federal-state programs like those created by the IDEA and Title V of the Clean Air Act, *Schaffer* and *Legal Environmental Assistance Foundation* will not be isolated cases. Ultimately, courts will be squarely confronted by converse-*Erie* and should answer the question it presents as Justice Breyer would have in *Schaffer*: in a manner that vindicates federal rights without undermining our federalist system.

137 *See supra* note 12 and accompanying text.