

Michigan Law Review

Volume 78 | Issue 6

1980

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Martin H. Redish
Northwestern University

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Recommended Citation

Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980).

Available at: <https://repository.law.umich.edu/mlr/vol78/iss6/7>

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COMMENTS

CONTINUING THE *ERIE* DEBATE: A RESPONSE TO WESTEN AND LEHMAN

*Martin H. Redish**

Although the Supreme Court has not spoken in detail on the *Erie* doctrine since its much-discussed decision in *Hanna v. Plumer*¹ in 1965,² commentary on the doctrine in the literature has undergone something of a “boomlet” in the last several years.³ Much of it⁴ has been stimulated by the groundbreaking article by Professor John Hart Ely in 1974.⁵ The latest contribution to the area is the recent article by Professor Peter Westen and Mr. Jeffrey Lehman appearing earlier this year in this journal.⁶ Unfortunately, their article does little to advance analysis of the *Erie* question, and contains numerous fundamental misstatements and misconceptions about the nature of the *Erie* inquiry.

While the authors purport to write about how the *Erie* doctrine will survive in a post-diversity world — a topic of tremendous importance — the overwhelming majority of the piece deals with the appropriate *Erie* analysis of all cases. It is only in Section III of the article⁷ that the authors, almost as an afterthought,⁸ fully consider the implications of *Erie* specifically in a non-diversity context. This

* Professor of Law, Northwestern University. A.B. 1967, University of Pennsylvania; J.D. 1970, Harvard University.—Ed.

1. 380 U.S. 460 (1965).

2. In the years since 1965 the Court has on occasion made reference to the *Erie* issue. See *Walker v. Armco Steel Corp.*, 100 S. Ct. 1978 (1980); *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977) (per curiam); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam). In none of these cases, however, has the Court made any effort to reevaluate the standards set out in *Hanna*. See Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 372 n.98 (1977).

3. See, e.g., Redish & Phillips, *supra* note 2; Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678 (1976); Mishkin, *Some Further Last Words on Erie — The Thread*, 87 HARV. L. REV. 1682 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974).

4. See Redish & Phillips, *supra* note 2; Chayes, *supra* note 3; Mishkin, *supra* note 3.

5. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

6. Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

7. *Id.* at 377-88.

8. After the first 65 pages of their 80-page article, Westen and Lehman state that “[t]he stage is now set for an analysis of *Erie* in nondiversity cases.” *Id.* at 377.

in itself might not be so troubling, if the authors' general *Erie* analysis were at all cogent. It is far from it.

The difficulties begin with the authors' discussion of what they label common "misconceptions" about the fundamental nature of an *Erie* analysis. One of these fallacies is described thus:

First, it is commonly assumed that the task under *Erie* is to resolve "conflicts" between federal law and state law by identifying "choice-of-law" principles for "choosing" between the two laws. This way of talking suggests a certain view of the world: It implies that two distinct rules exist (one federal, one state), each valid in itself and each purporting to govern the issue in dispute. Under this view, a federal court's task is, somehow, to choose which of the two valid and facially pertinent rules to apply.⁹

The authors attribute this view in part to me, a charge to which I must plead guilty. In fact, I would have thought the authors' characterization of this view of the *Erie* question was to be taken as a given. The *real* controversy, I had always assumed, came in deciding *how* to choose between those "two valid and facially pertinent rules" Certainly both the literature and the cases have always proceeded on this assumption.

Now we are told, however, that such a mode of analysis "is obviously nonsense,"¹⁰ because "[i]f a valid and pertinent federal rule exists, then of course it applies, notwithstanding any state rule to the contrary."¹¹ Why must a "valid and pertinent federal rule" control? Apparently because the supremacy clause¹² tells us so. This represents what might be charitably labeled a "creative" view of the supremacy clause. While of course that clause requires state courts to follow applicable principles of federal law, it has never been understood to tie the hands of the *federal* courts on a point of law not controlled by statute or Constitution. Presumably the federal court may choose in a particular instance, in the interests of comity, not to apply an otherwise applicable federal common-law rule and instead apply a state standard (assuming, of course, that such a decision is not inconsistent with applicable Supreme Court precedent). In fact, the authors seem to acknowledge as much later in their article.¹³

9. *Id.* at 314 (footnotes omitted).

10. *Id.*

11. *Id.*

12. U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

13. Westen & Lehman, *supra* note 6, at 373-77.

Perhaps the authors' criticism really points to an issue of semantics: if the federal court chooses to apply state law, there *is* no "valid and pertinent" federal rule, because the court has decided that such a rule is not "pertinent."¹⁴ The authors may also mean that there is no "choice" to be made between state law and federal law, because when chosen, the state law rule is not applied of its own force but as a federal rule of decision. This is a metaphysical point on which the authors expend considerable effort later in the piece.¹⁵ But while the authors' analysis is far from clear, the semantic point they appear to be emphasizing above all others is that if a federal court decides because of federal policy to be guided by state law principles, there is no "valid" federal rule, because the "validity" of federal common law is measured in part by limits imposed by federal policy.¹⁶ Even this point is not entirely clear, however, since the authors seem to contradict themselves about the measure of common-law "validity."¹⁷

However the issue is camouflaged linguistically, the ultimate choice of *Erie* is still between whatever federal standard the court would employ but for the presence of a conceivable state interest on the one hand, and the standard the state court would employ were the case brought before it, on the other. It matters little whether, as Westen and Lehman vehemently insist,¹⁸ we consider this a choice between competing federal policies (the policy behind the federal standard as compared to the federal policy in furthering other values, such as the desire to avoid forum shopping or to further cooperative federalism), or a choice between competing state and federal

14. Westen and Lehman define a "pertinent" rule to mean a rule "intended or designed to govern the issue at hand . . ." *Id.* at 342.

15. *Id.* at 356-57.

16. *Id.* at 364 ("the judge-made rules must satisfy not only constitutional and statutory standards, but also the separate standards governing the validity of federal common law"); *id.* at 373-74 (footnote omitted) ("the true source of the limitation on the authority of the federal courts to adopt a federal common law of procedure in diversity cases . . . is found, we believe, not in the Constitution or any specific act of Congress, but among the *federal policies* that underlie and shape federal common law") (emphasis original). See also *id.* at 375 (the outcome-determinative test "is a limitation which, if disregarded, would lead to the creation of a judge-made law of procedure that one would aptly describe as 'invalid'").

17. At one point in their article, Westen and Lehman state that there are "two principal grounds for declaring common law invalid . . ." They are "that the law as declared by the courts exceeds the scope of what the legislature is constitutionally capable of delegating to them," and that "it transgresses what the legislature intends by its implicit delegation of law-making power to the courts." *Id.* at 339. But at a later point, the authors describe yet a third measure of "validity": ". . . the judge-made rules must satisfy not only constitutional and statutory standards, but also the separate standards governing the validity of federal common law." *Id.* at 364. These standards apparently flow from non-statutory, non-constitutional "federal policies." *Id.* at 374 (emphasis omitted).

18. *Id.* at 356-57, 376-77.

rules. The ultimate mode of analysis will not differ whichever way we label it.

Illustrative is *Atkins v. Schmutz Mfg. Co.*,¹⁹ a diversity case in which the Fourth Circuit was faced with a choice between the rule it would normally employ about the tolling effect on the statute of limitations on a filing in another federal district (presumably a "valid and facially pertinent" rule) and the contrary rule that would probably have been employed by the courts of Virginia. While the court did choose to apply the federal standard, it did do so not because of some misguided notion about the supremacy clause. Rather, the court attempted to employ a sensitive interest-balancing analysis to decide how competing state or federal interests would be harmed or helped by the court's choice of law.²⁰ Westen and Lehman might approach *Atkins* in one of two ways. First, they might argue that the court improperly considered even the possibility of choosing a state standard, because there was a valid, pertinent federal common-law rule which the supremacy clause required to be followed. But while the early part of the article might lead one to believe the authors would make such a criticism, they puzzlingly acknowledge later on that on occasion, because of federal "policy," a court may choose to follow a state rule.²¹ Thus it is more likely that the authors would make the not-particularly-helpful semantic argument that in such a case, if the court had chosen to follow state law, there would have been no "valid" federal rule, or alternatively, that such a conclusion would not have represented a "choice" of "state" law, but rather the adoption of the state standard as the federal rule of decision. If the authors would make the first criticism, they would be replacing a sensitive interest analysis with a type of unbending federalism premised on a totally misguided understanding of the supremacy clause.²² If, on the other hand, the authors would make the second criticism, they would be obscuring the need for reasoned analysis behind a semantic barrage. In either event, the article makes little positive contribution to the continuing debate over the proper approach to *Erie*.

The article's inadequacy is underscored even more clearly in its analysis of the role to be played by the Rules of Decision Act²³ in the

19. 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).

20. 435 F.2d at 531-35.

21. Westen & Lehman, *supra* note 6, at 373 & n.189, 374.

22. For a critique of this type of approach to the *Erie* question, see Redish & Phillips, *supra* note 2, at 389-91.

23. 28 U.S.C. § 1652 (1976).

Erie controversy. The Act provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.²⁴

While the Rules of Decision Act has from the outset played a significant role in *Erie*'s development,²⁵ it was not until the Supreme Court's decision in *Hanna v. Plumer*²⁶ and Professor Ely's article that its true function was understood. After *Hanna* and Ely, it became clear that in making an *Erie* choice of law a court would look to the standards of the Rules of Decision Act only when the choice of a distinct federal rule would have been constitutional, and the choice-of-law issue was not controlled by another federal statute, such as the Rules Enabling Act.²⁷ I have differed with both the *Hanna* Court and Professor Ely on what those standards should be,²⁸ but we have all recognized exactly when the Rules of Decision Act was to be applied. Westen and Lehman, however, find no limit whatsoever in the Rules of Decision Act on the authority of the federal courts to develop principles of federal common law.²⁹ While such an argument might be fashioned on the ground that the terms of the statute are inherently circular,³⁰ Westen and Lehman fashion a wholly different argument. They suggest that it is "absurd" to "conclude that the Rules of Decision Act implicitly prohibits the federal courts from applying federal common law in the face of state rules to the contrary,"³¹ because "the distinction between federal common law and federal statutory law is merely a difference in emphasis."³² The argument is all but incomprehensible. If by its terms the statute indicates that state law will be the rule of decision in federal court except when otherwise provided by the Constitution, treaties or act of Congress, what possible difference does it make that the distinction between common and statutory law is one "in emphasis" (if indeed that is an accurate characterization)?³³ A congressional statute is

24. 28 U.S.C. § 1652 (1976).

25. *Erie R.R. v. Tompkins*, 304 U.S. 64, 71-73 (1938). See Ely, *supra* note 5, at 707-18.

26. 380 U.S. 460 (1965).

27. 28 U.S.C. § 2072 (1976).

28. Redish & Phillips, *supra* note 2, at 373-96.

29. Westen & Lehman, *supra* note 6, at 369-71.

30. By its terms, the Rules of Decision Act dictates that state laws be the rule of decision only "in cases where they apply," without providing any guidance to determine where state laws "apply."

31. Westen & Lehman, *supra* note 6, at 369 (footnote omitted).

32. *Id.* (footnote omitted).

33. Westen and Lehman attempt to support their contention that the court's role in inter-

still an "Act of Congress," and federal common law is still *not* an "Act of Congress." On this point, at least, the language of the Rules of Decision Act could not be more clear.

The authors attempt to support their assertion by a specious analogy to the "arising under" provision of article III. That article, the authors point out, has been construed³⁴ to include cases arising under federal common law, as well as statutory law.³⁵ But while article III does not specifically apply to *common* law, it does extend the federal judicial power to cases arising under the "Laws" of the United States. That term is of course linguistically capable of being construed to mean common, as well as statutory law. Indeed, did not *Erie* itself tell us that Justice Story's mistake in *Swift v. Tyson*³⁶ was that he construed the word "laws" of the state in the Rules of Decision Act to include only statutory and not common law?³⁷ In contrast to the language of article III, the Rules of Decision Act refers explicitly and inescapably only to "Acts of Congress." Unlike the word "Laws," such a phrase is not linguistically capable of being construed to include *common* law.

The authors may be correct when they assert that "[i]t is simply too late to suggest that the federal courts have no valid authority to create federal common law; they obviously do, and they exercise it all the time."³⁸ But such a "non-analysis" is not a ground upon which a scholar should comfortably rest his argument. While it is true that the federal courts have no doubt recognized their power to establish substantive common law under certain circumstances, they have usually attempted to tie this authority, directly or indirectly, to the presence of relevant federal statutes,³⁹ probably because of uneasiness about the Rules of Decision Act.

In the *Erie* context, both Professor Ely and I have attempted to interpret the cryptic language of the Rules of Decision Act in a man-

preting statutes is not significantly different from its function in establishing common law by citing the nature of the court's duty in interpreting section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Westen & Lehman, *supra* note 6, at 333. But that statute — which prohibits "combinations in restraint of trade" — is one of the most broadly phrased statutory directives ever enacted by Congress. Certainly, both the terms and legislative history of the overwhelming majority of congressional statutes are considerably more detailed than those of section 1 of the Sherman Act.

34. *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-101 (1972).

35. Westen & Lehman, *supra* note 6, at 369-70.

36. 41 U.S. (16 Pet.) 1 (1842).

37. 304 U.S. at 71-73.

38. Westen & Lehman, *supra* note 6, at 370.

39. *See, e.g., D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).

ner that would achieve what we deem important policy goals. Professor Ely, following the path of *Hanna*, construes the Rules of Decision Act to incorporate a concern about the “evils” of forum shopping: a federal court must apply a state procedural rule on an issue not specifically controlled by the Constitution, statute, or valid Federal Rule⁴⁰ if using a different rule would influence the plaintiff to choose either the federal or state forums.⁴¹ I, on the other hand, have rejected the importance of forum-shopping concerns,⁴² and have chosen instead to emphasize the need to further cooperative federalism by balancing the competing interests of the state and federal systems in having their respective procedural common-law rules apply.⁴³ But Westen and Lehman surprisingly avoid this controversy completely. In fact, much of their analysis tends to indicate that they are not even aware of its existence.

Westen and Lehman do not dispute that federal courts, in fashioning procedural common-law rules, may choose to defer to state standards. But they urge that such deference is dictated not by statute but by federal policy.⁴⁴ They find certain values in viewing these limitations as deriving from the common law rather than from the Rules of Decision Act.⁴⁵ But if it is recognized that the standard of interpretation adopted for the Rules of Decision Act flows neither from its cryptic language nor its equally obscure legislative history but rather from whatever social policies we deem advisable, it will effectively matter little whether we call our standard one of statute or one of “federal policy.” In fact, in what seems to be an inconsistency in analysis, Westen and Lehman subsequently acknowledge that “[u]ltimately, it makes no difference whether one views the outcome-determinative test as a common law limitation or as a statutory limitation In each case, the result would be the same.”⁴⁶ My difficulties with the “common law” analysis of Westen and Lehman go well beyond this narrow issue.

The first question about their suggested analysis concerns its seeming inconsistency with the earlier portion of their article. If, as Westen and Lehman suggest,⁴⁷ whenever there exists a “valid and

40. “Federal Rule” is intended to refer to a rule formally promulgated by the Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (1976).

41. Ely, *supra* note 5, at 709-18.

42. Redish & Phillips, *supra* note 2, at 373-77.

43. *Id.* at 378-96.

44. Westen & Lehman, *supra* note 6, at 374-75.

45. *Id.* at 376.

46. *Id.* at 375 n.196.

47. *Id.* at 315-16.

pertinent" federal rule the supremacy clause requires the federal court to apply it, how can that court disregard such a rule in the interests of "federal policy"? Are Westen and Lehman not engaging in the very practice they have so vigorously attacked — namely, "choosing" between equally valid, facially pertinent federal and state rules? The answer seems to bring us back once again to a matter of semantics: when Westen and Lehman allow a federal court — in the name of federal policy — to disregard an otherwise applicable principle of federal procedural common law, they believe that there is no "valid" federal rule on the issue. But unless we are to reach new heights of semantic triviality in interpreting the word "valid," this simply defies reality. The example of the six-member jury cited by Westen and Lehman⁴⁸ makes this clear. The federal court, let us assume, has a rule that all juries be composed of six members; the state has a 12-member jury requirement. While Westen and Lehman contend that in such a case federal policy should not be construed to require the federal court to apply the state rule,⁴⁹ it is impossible to deny that a *choice* is being made between two perfectly valid, facially pertinent rules, one state and one federal.

Perhaps the most troubling aspect of the authors' discussion of the "federal policy" limits on the power of the federal courts to fashion procedural common law is their apparent unawareness of the scholarly controversy over the appropriate standard to be applied in defining this limitation. They talk only in terms of the "outcome-determinative" test,⁵⁰ as if that were the only standard which has been suggested to limit federal court authority to disregard relevant state procedural principles. But of course, it is not. In fact, neither the Supreme Court nor any commentator has suggested use of a strict outcome-determinative test since 1958, when the Supreme Court all but abandoned the test in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*⁵¹ The authors identify Professor Ely as an advocate of such a strict "outcome-determinative" test,⁵² but this is a gross misreading of Ely. For in his article, Ely strongly advocated what he called the "rejuvenated" outcome determination test of

48. *Id.* at 373.

49. *Id.*

50. *Id.* at 365-66, 374. Westen and Lehman argue that federal courts should be allowed to depart from the strict outcome determinative test "in compelling cases," *id.* at 373, but fail to provide any guidance on how to determine whether a particular case is "compelling." *See id.* at 376-77.

51. 356 U.S. 525 (1958).

52. Westen & Lehman, *supra* note 6, at 365-66.

*Hanna*⁵³ (a test I have labeled the “modified” outcome determinative test).⁵⁴ Under this test the Court looks not merely to whether “the case [would] be decided differently in federal court than it would be decided in state court,”⁵⁵ as Westen and Lehman suggest. Rather, the *Hanna* Court explicitly modified the strict outcome-determinative test by suggesting that outcome determination “cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and the avoidance of inequitable administration of the laws.”⁵⁶ As a result, the more recent version of the outcome-determinative test asks whether use of a separate federal common-law procedural rule would influence forum shopping by a plaintiff between the state and federal forums. If it would, the federal court is required to employ the relevant state rule. While the authors seem to recognize that the *Hanna* Court looked to these broad policies,⁵⁷ they do not appear to have recognized that in doing so the Court confirmed its abandonment of the strict outcome-determinative test (which had in fact already been largely abandoned in *Byrd*).

The most disappointing aspect of the authors’ failure to recognize the subtle but significant distinctions between the strict and modified forms of the outcome-determinative test — other than that they seem to be more than twenty years behind the times — is that it effectively precluded them from contributing to the debate over the proper policy of the *Erie* doctrine that has evolved in recent years. Professor Ely has urged that moral values are the policies sought to be fostered by the modified outcome-determinative test;⁵⁸ I have questioned these values and have urged adoption of other policies — the interests in state-federal harmony — which should be deemed superior.⁵⁹ It would have been helpful if the authors had attempted to add to this debate. Since they have failed to recognize its existence, however, it was obviously impossible for them to have done so.

53. Ely, *supra* note 5, at 717. While Professor Ely emphasized that “*Hanna* was far from discarding [the outcome-determinative test] altogether,” *id.* at 717, he noted that the strict outcome-determinative test “seemed overbroad.” *Id.* at 709. “The point of the *Hanna* dictum,” he added, “is that it is difficult to find unfairness of a sort that would have troubled the framers of the Rules of Decision Act . . . when the difference between the federal and state rule is trivial, when their requirements are essentially fungible.” *Id.* at 713 (footnote omitted).

54. Redish & Phillips, *supra* note 2, at 373.

55. Westen & Lehman, *supra* note 6, at 366 (emphasis omitted).

56. 380 U.S. at 468 (footnote omitted).

57. Westen & Lehman, *supra* note 6, at 374.

58. Ely, *supra* note 5, at 717-18.

59. Redish & Phillips, *supra* note 2, at 373-84.

* * * * *

In his reply to this piece, Professor Westen attempts what he failed to do in his original article: to abandon semantics and deal with the important policy questions inherent in the *Erie* analysis.⁶⁰

60. While I believe that little need be added about my discussion of the Rules of Decision Act in light of Professor Westen's reply, I feel compelled to disagree with his incorrect interpretation of two cases used to support his reading of that statute. He cites *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-93 (1973), for the proposition that "federal 'common law' is implicitly included within the forms of federal law explicitly enumerated in the Rules of Decision Act." Westen, *After Life for Erie — A Reply*, 78 MICH. L. REV. 971, 987-88 n.62 [hereinafter cited as *Reply*]. The case says nothing of the sort. What it *does* say is that Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty *when they arise in the context of a specific constitutional or statutory provision*

In such cases, the Constitution or Acts of Congress "require" otherwise than that state law govern of its own force. 412 U.S. at 592-93 (emphasis added). All the decision holds, then, is that when — and only when — an issue arises in the context of an interpretation of the Constitution or a statute can that issue be controlled by federal law. Indeed the Court emphasized that "[t]his is not a case where the United States seeks to oust state substantive law on the basis of 'an amorphous doctrine of national sovereignty' divorced from any specific constitutional or statutory provision and premised solely on the argument 'that every authorized activity of the United States represents an exercise of its governmental power'. . . ." 412 U.S. at 592 n.10. This is a far cry from Professor Westen's unduly broad characterization. Undoubtedly, the overwhelming majority of procedural issues not controlled by the federal Rules of Civil Procedure that arise in a case do not, directly or indirectly, involve interpretation of a statutory or constitutional provision. See Redish & Phillips, *supra* note 4, at 384-400.

Professor Westen also cites *Hinderlider v. La Plata River Co.*, 304 U.S. 92, 110 (1938), for the proposition that "the certiorari statute, which confers jurisdiction on the Supreme Court to review claims under the 'Constitution,' any 'treaty,' or any 'statute' of the United States, implicitly includes 'federal law.'" *Reply*, 78 MICH. L. REV. at 987 n.61. He apparently believes that this case supports by analogy his tortured reading of the words, "Acts of Congress" in the Rules of Decision Act to include common law. Once again, however, Professor Westen misstates the decision. While the case did apply federal common law, this was not the basis for the grant of certiorari. Justice Brandeis's opinion states explicitly that "the State Court denied an important claim under the Constitution which may be reviewed on certiorari by this Court. . . ." 304 U.S. at 110. Thus it was because of the Constitution, not federal common law, that certiorari was granted.

In his reply Professor Westen suggests that I "beg[] the very question at issue . . ." about interpretation of the Rules of Decision Act. The real question, he states, is "whether the explicit enumeration of federal law in the Rules of the Decision Act is *exclusive* — a question on which the Rules of Decision Act is entirely silent." *Reply*, 78 MICH. L. REV. at 987 n.62. But the Act is not "entirely silent" on the point. It states that "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide," state law *shall* be regarded as rules of decision. The Act, in other words, says that state law is to provide the rule of decision in *all* civil actions, unless one of the explicitly enumerated exceptions applies. Since the common law is not one of the exceptions, the Act is quite clear that it cannot — at least in all cases — supplant state law.

Of course, I have never suggested that the Rules of Decision Act should be construed to prevent the creation of *all* federal procedural common law. Quite the contrary: I have consistently maintained that, when appropriate under the refined balancing test described in my earlier writings, federal procedural common law may be employed. This is because the Rules of Decision Act leaves us an out by cryptically providing that state law shall be the rules of decision only in cases where "they apply." I believe it is not unreasonable to conclude that state law should not "apply" when to do so would seriously disrupt an important federal interest without furthering an equally or more significant state interest. I fully realize that my construction of this statute is not the *only* conceivable reading, and I fully admit that my

Unfortunately, his efforts are no more successful here than they were originally.

Professor Westen now recognizes the existence of the debate over the appropriate policies to be furthered by the *Erie* doctrine. He dismisses what he labels — incorrectly — my “tenth-amendment-like-argument”⁶¹ that when making a choice of procedural law not governed by the Federal Rules, a federal court should look to the effect its choice will have upon both the state and federal systems, because such an approach “fails to explain both why diversity cases are *special*, and why the limitation on the formation of special federal common law is so *unyielding*.”⁶² This statement reveals Professor Westen’s unwillingness or inability to comprehend the delicate process of adjustment constantly taking place in the federal system.⁶³ Though it is conceivable that *Erie* could require a choice of state procedural law even in a federal question case, the reason why diversity cases are “special” is that, since *Erie*, it is assumed that there are no substantive federal policies being furthered in the adjudication of a diversity case. It is therefore appropriate to express greater concern for state interests in diversity cases, where the federal interests

interpretation is based not on clear legislative intent — which seems impossible to ascertain — but on what I deem to be important policy considerations. The same could be said of Professor Ely’s “interpretation” of the Rules of Decision Act to embody the “rejuvenated” outcome determination test. But at least my reading of the Rules of Decision Act represents a rational reading of the statute’s language. By suggesting that the Rules of Decision Act imposes absolutely no limitation on the power of the federal courts to create common law, Professor Westen ultimately turns the statute into a nullity, and thus has inescapably defied the clear meaning of the statute’s words, as well as all accepted canons of legislative interpretation. Presumably Congress does not enact a statute which is intended to have no effect whatsoever.

61. *Reply*, 78 MICH. L. REV. at 978. The characterization is incorrect, because I have at no time suggested that the tenth amendment — or any other constitutional provision — is in any way relevant to my suggested balancing process.

62. *Id.* at 978 (emphasis in original). Professor Westen fails to explain how a balancing test, which represents the height of flexibility, can be characterized as “unyielding.”

63. In his reply, Professor Westen argues that it is “inconceivable” that a Court generally so unconcerned about the impact of its decisions on state interests “could simultaneously wring its hands over the employment of federal procedures that might affect the outcome of diversity suits.” *Id.* at 980. The argument is difficult to comprehend, since I have never suggested that the Court actually *uses* a balancing test, but only that it *should* use one. In any event, if Professor Westen believes that the current Supreme Court has consistently expanded federal power without concern for its impact on state interests, one wonders where he has been for the last nine years, during which time the Court has substantially cut back on the power of the federal judiciary to interfere with state proceedings, for the very reason that such action would interfere with state concerns. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971). These are cases in which the federal courts were asked to vindicate important federal constitutional rights, yet the Supreme Court denied this power, for fear of harm to state interests. If the Court is concerned about the effect on state interests of the exercise of federal judicial power when an important federal right is at stake, surely it would not be surprising for the Court to express concern for the state system when state law is supplying the rule of decision, as it does in diversity cases.

are relatively limited. Thus, in the example of the Federal Rules of Evidence cited by Professor Westen,⁶⁴ the reason why Congress left to state law the content of evidentiary privilege only in diversity cases is quite probably the recognition that it is in those cases — where the substantive law applied is state, rather than federal — that the state interest in having its policies vindicated is at its strongest, while the federal interest in regulating conduct is at its weakest. When *federal* law supplies the rule of decision, the corresponding interests are, of course, reversed.⁶⁵

While Professor Westen attempts to refute my view of *Erie* as a doctrine of federalism, he has neglected to consider the arguments I have made in the past concerning the comparative triviality of the fairness concern that lies behind the modified outcome-determinative test.⁶⁶ There is therefore no need to reexamine them here. Perhaps if at some point Professor Westen attempted to sift through the rhetoric about “fairness” in which he enmeshes himself in his reply, he would finally recognize that it is the concerns about avoiding discrimination between litigants, not the interests of federalism, which are “picayune.”⁶⁷ In any event, if my response has done anything, it seems to have forced Professor Westen to complete what was previously an unfinished article. For this I am truly gratified.

64. *Reply*, 78 MICH. L. REV. at 981-82.

65. According to Professor Ely, the reason why Congress originally rejected federal evidentiary privilege rules, in addition to concern about their specific merits, was “a qualm sounding in federalism — a feeling that by refusing to recognize *in diversity cases* the privileges provided by local law, the federal government was making law that should be made by the states.” Ely, *supra* note 5 at 694 (footnote omitted) (emphasis added).

66. Redish & Phillips, *supra* note 2, at 373-77.

67. *Reply*, 78 MICH. L. REV. at 979.