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After "Life for *Erie*--A Reply

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AFTER "LIFE FOR *ERIE*"—A REPLY

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Erie, having "preoccupied the intellectually dominant group of academic lawyers rising to maturity during the 1940's and 1950's,"[1] is reported to be losing its "symbolic centrality"[2] for the newest generation of legal scholars. Professor Redish's prompt and excited response to our essay proves one thing: there is at least one scholar in the country who, having come to legal maturity during the last decade, still remains capable of becoming impassioned about *Erie R.R. v. Tompkins*.

I.

Although *Erie* may have "ceased to be the Pole Star" of contemporary legal scholarship, it "will remain a star of the first magnitude in the legal universe"[3] because it addresses two ever-present and profound questions in American political theory: (1) What is the relationship, or mix, between federal law and state law in the courts of the United States? (2) *Who decides* what that relationship shall be — the federal legislature or the federal courts?

(1)

As for the first question, it is fair to say that the relationship between federal law and state law is whatever Congress *desires* it to be. This should come as no surprise: it follows from the recognition that there are very few meaningful constitutional restraints on the assertion of congressional power vis-à-vis states, and that the few restraints which do exist are not generally enforced in the courts.[4] The same is true, too, of congressional assertions of power in diversity suits. Realistically, Congress is not likely to enact a rule of law for diversity suits that is so in excess of its enumerated powers, and so intrusive upon the "reserved" powers of the states, that the federal

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1. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977).

2. *Id.*

3. *Id.*

4. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS ch. 4 (1980).

courts would deem the statute invalid; if Congress did enact such a statute, it would mean that perceptions of federal power vis-à-vis the states and perceptions of diversity litigation had so changed, that "all bets" would be "off."[5]

To say that Congress may displace state law whenever Congress so desires means that for the federal government as a whole, the validity of federal rules of decision is not realistically at issue. For the federal government as a whole, the real question is not whether it has constitutional power to enact federal rules of decision in diversity and nondiversity suits, but whether it has legislative intent to do so; not whether a federal rule of decision is capable of displacing state law, but whether it purports to do so; not whether a federal rule of decision is valid as applied, but whether it is *pertinent* to the issue in dispute.

To say that state law must yield to federal law whenever the federal government as a whole desires it, however, does not tell us *when* that is. " 'Render unto Caesar the things which are Caesar's' does not tell us what things are Caesar's."[6] In order to decide whether to displace state law in the federal courts—that is, to decide between adopting an "independent"[7] federal rule of decision and adopting a federal rule that incorporates state law by reference[8]—the federal government must weigh three variables: (a) the value in prescribing any rule at all for the dispute, as opposed to allowing the dispute to be resolved by private standards;[9] (b) the value in creating an independent federal rule of decision, as opposed to using pre-existing and already operative state rules;[10] and (c) the value in maintaining

5. Compare J. ELY, DEMOCRACY AND DISTRUST 182-83 (1980).

6. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 280 (1946).

7. United States v. Standard Oil Co., 332 U.S. 301, 308 (1947).

8. This process can be described in different ways. One can say that the task is to determine whether there is an independent federal rule of decision and, if not, to determine further whether to adopt state law by reference or dismiss for lack of jurisdiction. Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 356-59 (1980). Alternatively, one can assume that the federal court has jurisdiction and, hence, say that the only issue is whether to apply an independent federal rule of decision or a federal rule that incorporates state law by reference. *See, e.g.*, Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). For most purposes, these are logically equivalent ways of stating the same thing. The only reason it may make a difference is that the latter formulation *assumes* that the federal court has jurisdiction to apply *some* rule of decision, while the former reserves the variable of jurisdiction for separate assessment.

9. For an example of such abstention, see Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

10. This variable applies only to *secondary* rules, *viz.*, rules that the national government is free to make or not make. The variable does not exist with respect to *primary* rules that prescribe an independent federal rule of decision as a matter of fundamental law. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

a federal forum to hear the dispute, as opposed to leaving its resolution to the state courts.[11] None of the variables can be ascertained without reference to the others: one cannot decide whether to adopt a federal rule as opposed to a state rule without also considering whether there ought to be any rule at all; one cannot decide whether or not to adopt any rule at all for a dispute without considering whether the federal courts will have jurisdiction to hear the dispute; one cannot decide whether the federal courts ought to assert jurisdiction without considering what rule of law they will be applying.

These are the issues that make *Erie* important and enduring. They underlie every proposed assertion of federal authority, and they operate as well in the adjudication of diversity suits as in other assertions of federal jurisdiction.

(2)

The second of the great *Erie* questions follows from the first. As we have seen, the federal government as a whole has authority to displace state law practically whenever it so desires, based on its assessment of the variable considerations set forth above. Since the federal government as a whole is free to draw the line between federal law and state law to be applied in the federal courts, the search for legal limits must turn elsewhere. Since the federal government as a whole has nearly plenary authority to choose, the significant question is, which branch of the government has authority to make such choices for the federal government as a whole? Since there are so few limits on *what* is decided, the real limits, if any, must be on *who* decides.

The limits derive from the way in which lawmaking competence is allocated among the three branches of the federal government. If the three branches each had concurrent and equal competence to make law (if that were even conceivable), none would be limited in defining the relationship between federal law and state law in the federal courts. However, since their competences are not the same, the allocation of competence creates limits on the authority of one branch to make law for another. Thus, the judicial branch has final authority to establish constitutional law (or, more accurately, to establish what it *says* is constitutional law), just as the legislative branch has final authority to make nonconstitutional law for the federal government. If the legislature enacts rules in conflict with con-

11. This variable does not apply to the few forms of *mandatory* federal jurisdiction. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors . . . the Supreme Court shall have original Jurisdiction").

stitutional law as announced by the courts, the rules lack authority; if the courts announce rules of statutory interpretation or rules of common law that are in conflict with enactments of the legislature, their rules, too, lack authority. The defect in the latter case is not that the federal government as a whole lacks authority to enact the rule, but that the federal courts have no authority to speak for the federal government. The issue is not what the federal government as a whole *desires* to do, but what each branch is *allowed* to do. The issue is not the pertinence of the federal rule — the issue is its *validity*.

The immediate issues in *Erie* itself were issues of validity. The issues were two-fold — one involving the validity of an act of Congress, the other involving the validity of a judge-made rule of railroad liability. The Rules of Decision Act had come to be understood to be a delegation by Congress to the federal courts to create federal general common law in diversity cases;[12] the Court in *Erie* invalidated the Act, so construed, because the Act conflicted with prevailing constitutional law as announced by the courts — law to the effect that the federal government has no general lawmaking power.[13] At the same time, the lower courts in *Erie* had created a special federal common-law rule of railroad liability applicable in diversity cases; the Court in *Erie* also invalidated this special judge-made rule — not because it exceeded the constitutional authority of the federal government as a whole — but presumably because it was a judge-made rule of nonconstitutional law that conflicted with prevailing nonconstitutional law as announced by the legislature.[14] The defect in each case was not that the respective rules were not intended to govern the issue in dispute, but that they had been enacted by branches of government with no authority to promulgate them.

Needless to say, while the analysis of validity can be illustrated by reference to *Erie*, it is not confined to diversity suits. It is potentially present in every assertion of federal authority, and it is present

12. The *Erie* Court also concluded that this understanding of legislative intent was false, and that Congress had not intended the Rules of Decision Act to be a delegation of general federal common-law power. Erie R.R. v. Tompkins, 304 U.S. 64, 72-73 (1938). But since the courts had followed the erroneous construction (and Congress, by its silence, had implicitly ratified it) for over a hundred years, the Court concluded that it was not free to repudiate it simply on *statutory* grounds. 304 U.S. at 77-78 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.").

13. 304 U.S. at 78 ("There is no federal general common law."). *See* Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384-98 (1964).

14. *See* Friendly, *supra* note 13, at 397 n.66; Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974).

in diversity adjudication to no greater degree than in other assertions of federal jurisdiction.

In the last analysis, validity and pertinence are mutually reinforcing. Determinations of pertinence are influenced by issues of validity, because in determining what they *want* to do, the branches of government are affected by what they believe they are *allowed* to do.[15] Conversely, issues of validity may shade into determinations of pertinence — not because the two issues are conceptually indistinct — but because of institutional deference by the courts to the legislature and because of institutional inertia in the legislature against the enactment of legislation. Thus, although the federal courts could rather frequently strike down congressional legislation as an unconstitutional intrusion upon powers reserved to the states,[16] they rarely do so; and, hence, they leave it to Congress to displace state law whenever Congress thinks best. By the same token, although Congress could nearly always repudiate nonconstitutional judge-made law by enacting superseding legislation, it tends to defer to the courts; and hence, Congress also leaves it to the courts to strike whatever balance between federal law and state law they deem best.[17] The consequence is that standards of validity are rarely enforced. In practice, if not in theory, each branch of government — like the federal government as a whole — exercises discretion to do what it believes to be desirable.

II.

The most significant thing about Professor Redish's response to our essay is that he disagrees with very little of it. He implicitly agrees with Jeffrey Lehman and me that diversity problems are a part of a larger inquiry into the relationship between federal law and state law in the federal courts. He apparently agrees with the axioms of federalism we set forth in Part I, including our description of the nature of the national government, the relationship of the national government to the constituent states, the competency of the respective branches of the national government, and the continuum that

15. *See* Westen & Lehman, *supra* note 8, at 344.

16. If anyone doubts this, consider the behavior of the Court in the period 1895-1937.

17. Indeed, when Congress eventually turns its hand to enacting legislation in areas of nonconstitutional law already developed by the courts, it often merely codifies the federal common law as previously (and tentatively) developed by the Courts. *See, e.g.*, Act of Nov. 2, 1966, 80 Stat. 1105, now 28 U.S.C. § 2254 (d) (1977), by which Congress amended the federal habeas corpus statute to codify in statutory form certain rules of nonconstitutional law that the Supreme Court had fashioned in the meantime in Townsend v. Sain, 372 U.S. 293 (1963). *See* White v. Swenson, 261 F. Supp. 42, 60 (W.D. Mo. 1966).

exists in judge-made law between federal statutory interpretation on the one hand and federal common law on the other. He also seems to agree with our application of the axioms in Part III to a selection of nondiversity problems.

Professor Redish focuses his attention on Part II, where we applied the axioms in rather painstaking detail to diversity suits — both in order to illuminate our approach to diversity problems and to lay a foundation for our later discussion of nondiversity problems. Even there, the area of his own previous work, Professor Redish finds little to disagree with. He implicitly agrees with our analysis of constitutional rules in diversity suits, including our suggestion that *Byrd* was wrongly decided. He also silently agrees with our analysis of statutory rules in diversity cases, and with our treatment of Federal Rules of Civil Procedure. In short, his disagreement is limited to one area alone — the sphere of judge-made rules in diversity cases.

Professor Redish's criticisms are essentially two-fold: (1) He disputes the *content* of the federal policy that limits (or ought to limit) the federal courts in fashioning judge-made rules in diversity cases. He denies that the policy is designed to protect *individual litigants* from discrimination in the outcome of litigation based on their places of citizenship, and argues, instead, that it is designed to protect *state governments* from the displacement of their law. (2) He also disputes the *source* of the foregoing policy. He denies that the policy itself is judge-made, and argues, instead, that it derives from the Rules of Decision Act.

We are disappointed in Professor Redish's response, because we hoped to persuade him; but we are not surprised, because he is repeating the same things he said three years ago. We disagreed with him then, and continue to disagree now, for essentially the same reason: by focusing only on diversity cases and, within diversity cases, only on judge-made rules, he takes too narrow a view of the relationship between federal law and state law in the federal courts. When one places the issue in the context of federal jurisdiction as a whole, one sees that the unique and rigorous rule that restrains the federal courts from creating judge-made law in diversity cases cannot be based on anything as tenuous as residual deference to the sovereignty of the states, and that even if it could, the rule could not be derived from anything in the Rules of Decision Act.

(1)

Although each person has his own favorite phrase, everyone es-

sentially agrees on the standard the Court applies to the formation of special federal common law in diversity cases. The Court says that the federal courts shall make no judge-made law that "significantly affect[s] the result of a litigation" (*York*),[18] or that "bear[s] substantially on the question whether the litigation would come out one way in the federal court and another way in the state court" (*Byrd*),[19] or that would "make . . . a difference to the . . . result of the litigation" (*Hanna*).[20] Jeffrey Lehman and I follow the Court in calling this the "outcome-determinative" limitation;[21] Professor Ely calls it the "rejuvenated" outcome-determinative test;[22] Professor Redish calls it the "modified" outcome-determinative test.[23] The essential point is that in fashioning special common law in diversity cases, federal courts are bound by a "polic[y]"[24] against the imposition of rules which would cause a litigant to win a suit in federal court that he would otherwise lose in state court—absent a (very) strong federal policy to the contrary.[25]

The dispute concerns the *rationale* or federal *value* that underlies the outcome-determinative limitation.[26] This is not an idle dispute, because without understanding the value that informs the limitation, one cannot know what the limitation means or how to apply it in

18. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

19. Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 536 (1958).

20. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965). For what we mean by "outcome-determinative," *see* note 25 *infra*.

21. *Compare* Westen & Lehman, *supra* note 8, at 364, *with* Hanna v. Plumer, 380 U.S. 460, 466 (1965).

22. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 717 (1974).

23. Redish & Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 373 (1977).

24. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

25. Professor Redish says that Jeffrey Lehman and I advocate a "strict" outcome-determinative test (as opposed to a "modified" outcome-determinative test). Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 966 (1980). But then Professor Redish also says that the Supremacy Clause does not apply to *federal* judges (as opposed to *state* judges). Anyone who wishes to know what Jeffrey Lehman and I actually advocate in the way of an outcome limitation may read it for himself. *See* Westen & Lehman, *supra* note 8, at 373-74, 381-85 & n.216.

To be sure, while the outcome-determinative limitation is the only *common-law* limitation on the formation of federal judge-made rules of procedure in diversity cases, it is not the *sole* limitation. In addition, federal judges are bound both by the enumeration of federal powers in the Constitution and by the requirement in the Rules Enabling Act, 28 U.S.C. § 2072 (1976), that they not abridge "substantive rights." *See* Westen & Lehman, *supra* note 8, at 364-65. Hence, in fashioning a federal common law of procedure in diversity cases, federal judges may not fashion rules that *either* affect outcomes within the meaning of *York or* abridge "substantive rights" within the meaning of the Rules Enabling Act.

26. Although Professor Redish prefers a "balancing" test to an "outcome-determinative" test, he admits that the two tests often produce the same results. Redish & Phillips, *supra* note 23, at 384. Thus, the real issue is, not so much the content of that test, but the rationale that underlies it.

future cases. We argue that the controlling value is the defeasible policy against unfairly discriminating between state court litigants and federal court litigants regarding the results of their litigation based on their places of citizenship. Professor Redish argues that the limitation is based — not on a notion of personal unfairness to individual litigants — but on a generalized reluctance to intrude upon the authority of the states to make law of their own.

Professor Redish phrases his tenth-amendment-like argument in different ways. He talks about the "interest[] of the state[s] . . . in having their respective . . . rules apply";[27] about the "balance of authority and power within the federal system";[28] about the fear of enacting federal law that "undermine[s] the attainment of legitimate state objectives."[29] What it all comes down to, however, is the same fear that troubled antebellum judges in the first quarter of the twentieth century: the fear that the federal government will gobble up so much of the sphere of governance that there will be nothing left for the states to regulate. As he puts it, the relevant concern is the "need to preserve a balance between competing state and federal interests and policies — in sum, the interest of the federal system."[30]

The problem with Professor Redish's generalized invocation of "federalism" is not that federalism is immaterial, but that it fails to explain both why diversity cases are *special*, and why the limitation on the formation of special federal common law in diversity cases is so *unyielding*.[31] We would be the last to deprecate the value of what

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

28. Redish & Phillips, *supra* note 23, at 380.

29. *Id.* at 378.

30. *Id.* at 360.

31. Professor Redish has no answer to this. His only response is a veiled suggestion that the reason federal courts are prohibited from creating federal common law in diversity cases is that there are *no* "federal policies" to be "furthered." Redish, *supra* note 27, at 969. The suggestion is not only false, it is unresponsive. If there are no "federal policies" to be furthered, the issue of federal common law never arises: one does not need to *prohibit* the federal courts from making federal law in areas in which they have no plausible reasons for doing so. The task of prohibiting the federal courts from forming federal common law arises only where there *are* legitimate (though, perhaps, insufficient) reasons for creating independent federal rules of decision. Thus, consider this question: in creating a federal common law of testimonial privileges, should the federal courts also extend it to diversity cases, or should they defer to state rules of privilege in diversity cases? It goes without saying that federal courts have a legitimate interest in disregarding state privileges — *i.e.*, the ever present interest of courts in being able to compel testimony pertinent to the disputes before them. If the federal courts are prohibited from applying federal rules of privilege in diversity cases, therefore, it is not because they have no legitimate interest in applying them, but because their interest is outweighed by *special* and *rigorous* federal policies that are peculiar to diversity cases. *See* FED. R. EVID. 501 (federal courts, which have authority to create a federal common law of privileges for nondiversity suits, are prohibited from applying them in diversity suits in the face of state rules of privilege to the contrary).

is disparagingly called "states' rights."[32] The American government is an effort by people to distribute sovereignty in an uneasy balance between the central government and the constituent states, and the balance is affected every time the central government asserts its authority to the displacement of the states.[33] But the problem of states' rights is hardly unique to diversity cases. It is fully implicated whenever a federal constitutional command is made binding on the states, whenever a constitutional command to the states is broadly construed, whenever new constitutional rights are created vis-à-vis the states, whenever the national legislature enacts legislation in areas of governance shared by the states, and whenever the federal courts infer federal civil remedies from federal prohibitions, or fashion bodies of special federal common law. Indeed, as far as states' rights are concerned, each of the foregoing assertions of federal power is far more intrusive and traumatic to the "federal system" than any picayune application of federal procedural rules in diversity suits. If the central government can be trusted to make such momentous decisions on behalf of the states — and to do so without the need for rigorous judicial review or special self-restraint — surely it can be trusted to adopt judge-made rules of procedure in diversity cases.

To put it bluntly, it is inconceivable that a Court that has rendered nearly the entire Bill of Rights applicable to the states, that imposes extensive obligations on the states through its interpretations of fourteenth amendment "equality," that imposes new duties on the states through its novel determinations of "liberty" and fourteenth amendment "due process," that defers to nearly every assertion of national legislative authority, that allows the federal government to condition its enormous spending power on conforming regulation by the states, that sustains massive delegations of

32. For an interesting effort to fashion a constitutional doctrine of "states' rights" as a bulwark against federal encroachment, see Fry v. United States, 421 U.S. 542, 549-59 (1975) (Rehnquist, J., dissenting). The significant thing about Justice Rehnquist's views, however, is how rare they are. *But see* National League of Cities v. Usery, 426 U.S. 833 (1976) (per Rehnquist, J.).

33. Precisely for this reason, Jeffrey Lehman and I argued that in deciding between fashioning an independent federal rule of decision on the one hand, or adopting state law by reference on the other, the courts should always recognize a species of *presumption* in favor of state law. *See* Westen & Lehman, *supra* note 8, at 380 n.207. The two most significant things that can be said about the presumption, however, are (1) it appears to be rather easily outweighed by countervailing federal interests, and (2) it is not peculiar to diversity cases, but applies in every assertion of federal jurisdiction. Consequently, if there is an unusually strong preference for state law in diversity cases, it must be based on something other than the generalized and ever-present preference for "adopt[ing] the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation." United States v. Kimball Foods, Inc., 440 U.S. 715, 740 (1979) (footnote omitted). For what that "something" is, see notes 35-38, *infra*.

national lawmaking authority to federal administrative agencies, that engages in expansive interpretations of federal regulatory statutes, and that creates extensive areas of special federal common law — all while scarcely *mentioning* their effect on continued governances by the states — could simultaneously wring its hands over the employment of federal procedures that might affect the outcome of diversity suits.[34] If the Court is serious about exercising special restraints in diversity cases (and it clearly is), it must be concerned with some principle of justice peculiar to diversity cases — some personal claim of right more acute than a residual plea for states' rights.

The answer is not hard to find. It appears in every major opinion by the Court since *Erie*, and in *Erie* itself; the limitation on the creation of special federal common law of procedure in diversity cases is based on an anti-discrimination principle, a principle against unfairly discriminating against litigants with respect to the outcome of their disputes based on their places of citizenship. That is what Justice Brandeis meant in condemning *Swift* for "introduc[ing] grave *discrimination* by non-citizens against citizens" and for rendering "equal protection of the law" "impossible" (*Erie*);[35] what Justice Frankfurter meant in saying that "the fortuitous stance of residence out of State of one of the parties to a litigation ought not give rise to a *discrimination* against others equally concerned but locally resi-

34. Professor Redish responds that the cases beginning with Younger v. Harris, 401 U.S. 37 (1971), demonstrate that the Court *is* capable of wringing its hands over states' rights. Indeed, *Younger* and its progeny are intriguing precisely because they *do* reveal a degree of fastidiousness for federalism that is not reflected in the Court's other decisions. But it does not follow that one can jump from *Younger* to *Erie* because, in fact, the two cases are significantly different: the issue of federalism in *Younger* is *not* which government (state or federal) has authority to enact the applicable rule of decision for a case, but which judges shall hear the case in the first instance. This is significant for two reasons: first, it means that in deferring to state-court judges in *Younger*, the Court is *not* deferring to any abstract interest of the state as a whole in being able to make law, but is empathizing with the personal embarrassment that *any* judge feels when a higher authority interrupts a proceeding he has already commenced to adjudicate and drives him from the bench. Second, it means that in deferring to state-court judges in *Younger*, the Court is *not* foregoing federal authority to enact the applicable rule of decision, or foregoing the opportunity to review the application of federal rules to the case at hand, but is merely *postponing* its review until after the state court has had an opportunity to give effect to federal law. Hence, given these distinctions, the Court's deference to federalism in *Younger* does not explain its very different and rigorous insistence that the federal courts be prohibited altogether from making judge-made law in diversity cases.

35. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-75 (1938) (emphasis added). Needless to say, in speaking of "equal protection," Justice Brandeis was not referring to the fourteenth amendment (which, then, applied only to the states) or to any other constitutional limitation. The *constitutional* problem referred to in *Erie* was the practice of fashioning federal judge-made law in areas in which the federal government as a whole has no competence to govern. *See* Friendly, *supra* note 13. The "discrimination" in the application of federal judge-made law was a separate issue in *Erie* and was condemned, not because it was unconstitutional, but because it violated the federal common-law policy against causing litigants to lose suits in state court that they would have won in federal court, solely because of their place of citizenship. *See* Westen & Lehman, *supra* note 8, at 371 n.181. *See also* note 14 *supra*.

dent" (*York*);[36] what Chief Justice Warren meant in saying that it is "*unfair* for the character or result of a litigation materially to differ because the suit ha[s] been brought in a federal court";[37] what the Court meant this year in calling it " '*inequitable*' " for a federal diversity suit to come out differently than it would in state court "solely because of the fortuity that there is diversity of citizenship between the litigants."[38]

The foregoing anti-discrimination "polic[y]"[39] is not constitutionally mandated, nor is it absolute. But it is sufficiently strong that the federal courts ought not to depart from it, except in response to a legislative directive or to a federal policy so strong that the legislature could reasonably be expected to deem it dominant.

The difference between Professor Redish's notion of states' rights and Justice Brandeis's notion of "discrimination" can be illustrated by Congress's response to the proposed Federal Rules of Evidence. Congress codified existing practice by authorizing the federal courts to continue to fashion a "common law" of evidentiary privileges based on judicial interpretations of "reason and experience";[40] yet, at the same time, Congress also codified existing practice by prohibiting the federal courts from applying such privileges in diversity suits.[41] What is the federal policy that explains the distinction? Why should Congress be willing to displace state rules of privilege in every area of life touched by federal jurisdiction and, yet, refrain from doing so in diversity suits? The distinction cannot be based on any generalized deference to state law, because if Congress were solicitous of state law, it would prohibit federal rules of privilege altogether. Nor can it be based on any incremental impact on state-created relationships of confidentiality that results from displacing state law in diversity suits, because once the federal government intrudes at all upon the imparting of confidences, the damage is already done.[42] Rather, the distinction must be based, not on a respect

36. Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1945)(emphasis added).

37. Hanna v. Plumer, 380 U.S. 460, 467 (1965) (emphasis added).

38. Walker v. Armco Steel Corp., 100 S. Ct. 1978, 1986 (1980) (emphasis added) (*citing* Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

39. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

40. FED. R. EVID. 501.

41. *Id.*

42. Since state-created testimonial privileges are designed to encourage communication by guaranteeing the communicants confidentiality, the impact of the privilege is felt at the time the communication is made. At the time they engage in communication, people do not know whether they will eventually end up in court, or, if so, whether they will end up in state court or federal court, or, if in federal court, whether they will be involved in a federal-question suit or a diversity suit. The only significant issue at the time of their communication is whether there is a significant risk that *some* court in *some* suit will force the communication to be

for state law (which Congress is willing to displace), but on a concern for individual litigants: a belief that it is "inequitable"[43] for the outcome of litigation to depend upon the citizenship of the parties.

(2)

> *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.*
>
> *Rules of Decision Act*[44]

Professor Redish also disputes the *source* of the limitation on the application of federal judge-made rules in diversity cases. He does not believe (as Jeffrey Lehman and I believe) that the limitation is a judge-made or judge-acknowledged policy governing the creation of special federal common law of procedure in diversity cases. He believes, instead, that the limitation has a specific statutory source in the Rules of Decision Act.

We shall not dwell upon the facts that (a) the Rules of Decision Act does not speak to diversity cases, but extends to all federal "civil actions"; (b) the Rules of Decision Act says nothing at all about any limitations on judge-made rules or federal common law; (c) the Supreme Court has held that the Rules of Decision Act contains no limitations on the authority of the federal government to make law, but is merely a truism of the relationships between federal law and state law that would otherwise exist in its absence;[45] and (d) the Supreme Court has held the outcome-determinative limitation to be binding even in diversity cases where the Rules of Decision Act does not apply.[46] These objections are set forth at length in our article.[47]

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disclosed. Consequently, once federal courts are allowed to disregard state-created privileges in *any* significant number of suits, the damage to state-created relationships of confidentiality is already done.

43. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

44. 28 U.S.C. § 1652 (1976).

45. Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945). Professor Redish complains that this renders the Rules of Decision Act a "nullity." Redish, *supra* note 27, at 967-68 n.60. If so, he should direct his criticism at the Supreme Court because it has been saying for over 150 years that the Rules of Decision Act is nothing but a truism. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945) (the Rules of Decision Act is "merely declaratory of what would in any event have governed the federal courts"), *with* Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 464 (1831) (the Rules of Decision Act "has been uniformly held to be no more than a declaration of what the law would have been without it"). *Accord*, Bank of Hamilton v. Dudley's Lessee, 27 U.S. (2 Pet.) 492, 525 (1829) (Marshall, C.J.).

46. Until it was amended in 1948, the Rules of Decision Act applied only in "trials at common law," and not in suits in equity. *See* Russell v. Todd, 309 U.S. 280, 287 (1940). Yet the outcome-determinative limitation was nonetheless held applicable in suits in equity. *See*

Professor Redish's present thesis, that it is the Rules of Decision Act that prohibits the federal courts from adopting certain kinds of judge-made rules of procedure in diversity cases, is based on a negative inference from the Act: the Rules of Decision Act directs the federal courts to apply state law, except where certain varieties of federal law provide otherwise; in enumerating the variety of superseding federal law, the Act mentions only three — the Constitution, treaties of the United States, and Acts of Congress; it says nothing about federal common law or other species of judge-made law; hence (so the argument goes), by *omitting* any reference to the federal common law, the Rules of Decision Act implies that the federal courts shall not apply federal common law in the face of state law to the contrary. In other words, Professor Redish argues that the Rules of Decision Act, by negative implication, prohibits the federal courts from fashioning federal common law in any area in which state law exists to the contrary.

There are obvious problems with Professor Redish's hypothesis. First, if the Rules of Decision Act truly prohibits the federal courts from fashioning federal common law, the prohibition applies the Act not only in diversity cases, but in *all* "civil actions." Yet on the same day he delivered his opinion in *Erie R.R. v. Tompkins*, Justice Brandeis also wrote for a unanimous Court in *Hinderlider v. LaPlata River Co.*,[48] holding that the federal courts *do* have legitimate authority to fashion federal common law. The federal courts have not only exercised such authority ever since, in areas now too numerous to count, but have done so for a very good reason: because the very silence on the part of Congress in areas that call for uniform federal regulation implies authority in the federal courts to fashion judge-made law in the first instance, subject to oversight by the legislature.[49]

Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 205 (1938).

47. *See* Westen & Lehman, *supra* note 8, at 365-73.

48. 304 U.S. 92, 110 (1938).

49. People sometimes ask: where do federal courts get the *constitutional authority* to create federal common law? Perhaps the best way to answer is to put the counter-question: where do federal courts now get the constitutional authority to interpret federal statutes?

The answer to each question is the same because the questions themselves are the same. The federal courts derive their authority to fashion federal common law from the same constitutional source as their authority to interpret statutes because they are doing essentially the same thing in each case: making law in areas of legislative silence, on the assumption that the legislature would wish them to do so.

But wait, people might ask: what if the legislature does *not* want the courts to create federal common law? Again, the answer is the same as with statutory interpretation: if the federal courts conclude that Congress does not desire them to form federal common law, they should respond in the same way they would in interpreting a statute under the circumstances

Second, even if the Rules of Decision Act is somehow construed to prohibit federal common law solely in *diversity* cases, the construction conflicts with irrefutable authority to the effect that the federal courts *may* create federal common law in diversity cases. Thus, to take a noted example, the Court held in *Banco Nacional de Cuba v. Sabbatino*[50] that the federal courts have authority to fashion a federal common law regarding "acts of state" and to apply it as fully in diversity suits as in other assertions of federal jurisdiction. Similarly, in *Howard v. Lyons*[51] the Court held that it had authority to create a federal common law of official immunity for federal officials, and to apply it in all pertinent cases, including cases arising in diversity. To say that the Rules of Decision Act prohibits the formation of federal common law in diversity cases not only means that *Sabbatino* and *Lyons* were wrongly decided, but that the legitimate federal purposes such law serves must go unfulfilled in diversity cases.

Third, even if the Rules of Decision Act is somehow construed as solely a prohibition on the formation of a federal common law of *procedure* in diversity cases, it still goes too far, because the prohibition would invalidate all judge-made rules of procedure, regardless of whether they were outcome-determinative or not. Yet Professor Redish himself believes that the federal courts do have authority under the Rules of Decision Act to adopt some judge-made rules of procedure in diversity cases, *viz.*, rules designed to further federal interests that "outweigh,"[52] or "outbalance,"[53] the state interests underlying the state rules to the contrary.[54] Hence, in order to force the

— by abstaining from forming a federal rule of decision. *See, e.g.*, United States v. Evans, 333 U.S. 483 (1948) (abstaining from construing the penalty provisions of an ambiguous statute, on the ground that Congress would not wish the Court to engage in guesswork). Hence, the formation of federal common law *presupposes* that the legislature would desire it to be formed.

As for the actual source of the federal judiciary's authority to fashion federal common law, it (like the cognate authority to interpret federal statutes) can be attributed either to a delegation from the legislature or to a direct delegation from Article III. Thus, one can argue that Congress implicitly authorizes the courts to make law by remaining silent in areas that call for uniform federal regulation. *See, e.g.*, Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 451 (1957) (Congress's grant of jurisdiction to the courts "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements"). Alternatively, one can argue that Article III gives the courts power to make law wherever Congress remains silent in an area calling for uniform federal regulation. Ultimately, it makes no difference which conception one adopts. The important thing is to know (a) when Congress has been silent, and (b) whether an area calls for uniform federal regulation.

50. 376 U.S. 398 (1964).

51. 360 U.S. 593 (1959).

52. Redish & Phillips, *supra* note 23, at 399.

53. *Id.* at 398.

54. *Id.* at 391-92, 397-98. Notice the significance of this concession. Professor Redish concedes that the federal courts have authority under the Rules of Decision Act to fashion a common law of procedure in diversity cases whenever the federal interest in doing so *outweighs* the federal interest in applying state law by reference; he also concedes that federal

outcome-determinative limitation into the language of the Rules of Decision Act one must make the following assumptions: (a) that by omitting any reference to "federal common law," the Rules of Decision Act implicitly prohibits the federal courts from applying it in the face of state law to the contrary; (b) that despite its reference to all "civil actions," the Rules of Decision Act should be construed to apply only to *diversity* suits; (c) that despite its complete omission of any reference to "federal common law," the Rules of Decision Act should be construed to prohibit only federal common-law *procedure* in diversity cases; and (d) that despite its now implicit prohibition on judge-made rules of procedure, the Rules of Decision Act should be further construed to prohibit only *certain* judge-made rules of procedure in diversity cases.

The alternatives should now be clear. One can conclude (as Jeffrey Lehman and I do) that the federal courts do have authority to create special areas of the federal common law; that in doing so, they balance the federal need for uniform nationwide rules against the value of adopting state law by reference; that one of the "policies"[55] that governs the adoption of state rules in diversity cases is to insure that diversity suits come out no differently in federal court than they would in state courts "a block away"[56] — in sum, that the outcome-determinative limitation is a judge-made policy that guides the courts in their formation of federal common law and, hence, is itself an *aspect*, or *rule*, of federal common law.

The foregoing conclusion, that the outcome-determinative limitation has its source in federal common law, is entirely consistent with the Rules of Decision Act. It simply means that the varieties of federal law enumerated in the Rules of Decision Act are not exclusive,

courts have separate authority under the Rules of Decision Act to create different bodies of federal common law in nondiversity cases — different because the considerations being "weighed" are different in nondiversity cases and hence, so too is the resulting "balance." Yet where does a federal court look for the considerations to be placed in these various "balances"? And where does it find authority on how much *weight* to give the various considerations? Obviously not in the Rules of Decision Act because, by Professor Redish's own concession, the Rules of Decision Act does not itself itemize the considerations or tell the federal courts how much weight to give them in the many diversity and nondiversity cases in which they may arise. The only thing the Act does is to instruct the federal courts to give whatever considerations may be appropriate whatever weight the considerations may deserve. *Yet that is precisely what Jeffrey Lehman and I have been saying all along.* Thus, Professor Redish implicitly concedes what we have been asserting from the outset, *viz.*, that while the Rules of Decision Act authorizes the federal courts to create areas of special federal common law in diversity and nondiversity cases, alike, the Act does not itself enumerate the standards for determining what those many bodies of law shall be: rather, it incorporates by reference whatever standards otherwise exist. *See* Westen & Lehman, *supra* note 8, at 368-69.

55. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

56. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

and that in addition to the "Constitution," "treaties of the United States," and "Acts of Congress," the Act implicitly includes "federal common law." It is perfectly reasonable to read the latter term into the Act, because, in the last analysis, federal common law shades into judicial interpretation of "Acts of Congress" as points do on a spectrum.[57] Thus, the Supremacy Clause (which refers to the "Constitution," "treaties," and "laws of the United States") is understood implicitly to include federal common law;[58] so, too Article III (which confers jurisdiction over cases arising under the "Constitution,"

57. Professor Redish finds this point "incomprehensible," so perhaps we should spell it out. To say that a great oak tree differs from an acorn as a matter of degree does not mean one cannot distinguish between the two. It depends entirely upon one's purposes in making the distinction. For purposes of gathering wood, one *would* draw a line between them because as an acorn grows into an oak tree, it undergoes innumerable and continuous *changes* that together add up to something significantly different with respect to wood content. For purposes of genetic testing, one would *not* draw a line, because as an acorn grows into an oak tree, it does *not* undergo any changes with respect to its genetic makeup. The latter is what one means by saying that the two differ *only* in degree.

The same is true, too, of the difference between federal common law and federal statutory interpretation. To say that they differ from one another in degree, and the one shades into the other as points on a spectrum, means that they are simultaneously both the same and different; that is, they are the same as each other in some respects, and different in others. Whether one can draw a line between them thus depends upon whether the differences between them are *significant* with respect to one's purpose in drawing the line. Jeffrey Lehman and I, ourselves, distinguish between the *statutory* test that governs judicial promulgation of Rules of Civil Procedure (*i.e.*, that they not abridge "substantive rights") and the *common-law* test that governs the adoption of judge-made rules of procedure in diversity cases (*i.e.*, that in addition to not abridging "substantive rights," they also not be "outcome-determinative"). What justifies the line, and explains its placement, is its underlying purpose — namely, that the federal courts not apply a federal rule that causes diversity cases to come out differently than they would in state court, except in the presence of very strong evidence that the legislature would ratify the rule. By that standard, Rules of Civil Procedure *are* different from other judge-made rules because the distinct mechanism for their adoption provides the degree of legislative oversight that is necessary to legitimate the adoption of outcome-determinative rules of procedure in diversity cases.

To say that federal statutory interpretation can be distinguished from federal common law for the foregoing purpose, however, does not mean that the two can be distinguished for purposes of *supremacy*. It depends, again, upon the purpose underlying the principle of supremacy. That is, it depends upon whether the differences between federal statutory interpretation and federal common law are significant for purposes of supremacy. If (as we believe) the controlling purpose is to permit the federal government to displace state law with federal law whenever a legitimate institution of the federal government — whether legislative, executive, judicial, or administrative — makes law that is both constitutional and subject to legislative oversight, there is no reason at all to distinguish between the two; because for *that* purpose, there are *no* differences between statutory interpretation and federal common law. That, again, is what it *means* to say that they differ *only* in degree.

58. *See* Kossick v. United Fruit Co., 365 U.S. 731, 738-42 (1961); Romero v. International Terminal Operating Co., 358 U.S. 354, 378 & n.49 (1959); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-11 (1953); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Southern Pac. Co. v. Jensen, 244 U.S. 205, 215-18 (1917). *See also* Friendly, *supra* note 13 at 405; Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1073-79 (1967); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1514 (1969). *But cf.* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 500 (1954) (the common law as state law).

"treaties," and "laws of the United States");[59] the general federal question statute (which confers jurisdiction over cases arising under the "Constitution," "treaties," and "laws of the United States");[60] and 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).[61] If that were not enough, the Court has now firmly held that the explicit enumeration of federal law in the Rules of Decision Act is not exclusive, but implicitly includes "federal common law."[62]

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59. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (implicitly holding " 'federal common law' " to be included in the "arising under" provisions of Article III). *See generally* Comment, *Federal Common Law and Article III: A Jurisdictional Approach To* Erie, 74 YALE L.J. 325, 331 (1964).

60. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 98-101 (1972) ("federal common law" is implicitly included within the forms of federal law enumerated in the "arising under" provisions of 28 U.S.C. § 1331). *See generally* Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817, 831 (1960); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 165 (1953).

Indeed, even if Congress originally intended the Rules of Decision Act as a prohibition on the federal courts from creating federal common law, Congress must have implicitly repealed the prohibition when it later enacted the federal question statute in 1875 (now 28 U.S.C. § 1331), because it would be absurd to confer jurisdiction on the federal courts to hear cases "arising under" a federal common law that the federal courts had no authority to fashion in the first place!

61. Act of Feb. 13, 1925, 43 Stat. 937 (1925), now codified at 28 U.S.C. § 1257(3) (1976) (emphasis added). *See* Hinderlider v. La Plata River Co., 304 U.S. 92, 110 (1938) (the certiorari statute, which confers jurisdiction on the Supreme Court to review claims under the "Constitution," any "treaty," or "statute" of the United States, implicitly includes "federal common law").

Hinderlider should be of special interest to Professor Redish because, unlike the Supremacy Clause, Article III, and the federal-question statute (which all refer to "laws"), the certiorari statute refers to "statutes"; yet the *Hinderlider* Court held that the certiorari statute, too, should be read implicitly to include claims under "federal common law."

To be sure, having concluded that the case was based on "federal common law" of interstate water apportionment, the *Hinderlider* Court also said that the case presented a "claim" under "the Constitution" within the meaning of the certiorari statute. 304 U.S. at 110. But the Court surely did not mean to *contrast* the "Constitution" with "federal common law" because that would mean taking the entire existing law of interstate water apportionment and transforming it from "federal common law" into a class of *constitutional* law. Rather, by referring to a claim under "the Constitution," the *Hinderlider* Court must have meant a claim of "federal common law" that, in turn, was *authorized* by the Constitution. *See* Moore, *Federalism and Foreign Affairs*, 1965 DUKE L.J. 248, 278-80.

62. United States v. Little Lake Misere Land Co., 412 U.S. 580, 591-93 (1973) (federal "common law" is implicitly included within the forms of federal law explicitly enumerated in the Rules of Decision Act). For predecessor opinions, see Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 709 (1966) (White, J., dissenting) (federal common law is federal law within the meaning of the Rules of Decision Act); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 465-71 (1942) (Jackson, J., concurring). *See also* Robertson v. Wegmann, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting):

> [The Rules of Decision] Act provides that state law is to govern a civil trial in a federal court "*except* where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." The exception has not been interpreted in a crabbed or wooden fashion, but, instead, has been used to give expression to important federal interests. Thus, for example, the exception has been used to apply a federal common law of labor contracts in suits under § 301(a) of the Labor Management Relations Act [of] 1947;

Alternatively, one can go the way of Professor Redish. One can assume that despite its language, despite its history, despite its uniform interpretation by the courts, the Rules of Decision Act has all along contained a secret and silent proviso (below in italics). The alternatives are these:

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to apply federal common law to transactions in commercial paper issued by the United States where the United States is a party; and to avoid application of governing state law to the reservation of mineral rights in a land acquisition agreement to which the United States was a party and that bore heavily upon a federal wildlife regulatory program. (Emphasis added) (citations omitted).

To be sure, there was also a statute involved in *Little Lake Misere*, *viz.*, the Migratory Bird Conservation Act. But the presence of a statute does not preclude a case from being based on federal common law. If it did, there could *never* be federal common law because there is *always* a statute somewhere in the background. *See* Westen & Lehman, *supra* note 8, at 336 n.80. All common law — state as well as federal — takes its shape from the legal norms as a whole of the society in which it operates, including statutory norms. Hence, the real question is not whether supporting statutes exist, but whether the statutory norms are sufficiently specific to enable a court to say that its resulting decision is truly an *interpretation* of the statute. If the supporting statute is too vague or uncertain or removed to give the court any real guidance in fashioning a rule of decision, the resulting rule is one of "federal common law" — *because that is what federal common law means. See* Westen & Lehman, *supra* note 8, at 331-36, 375-76. By that measure *Little Lake Misere* was based on federal common law because, with respect to the issue in dispute, "no provision of the Migratory Bird Conservation Act guide[d]" the Court. Since the Act "fail[ed] to specify whether or to what extent it contemplates displacement of state law," (412 U.S. at 592-93 n.10), the Court was " 'require[d] . . . to declare, *as a matter of common law* or "judicial legislation," rules which may be necessary to . . . effectuate the statutory patterns enacted in the large by Congress' " (412 U.S. at 593) (emphasis added).

To all this, Professor Redish's only answer is that by referring to "Acts of Congress" (as opposed to "laws"), the Rules of Decision Act is "*linguistically fin]capable*" of encompassing federal common law. Redish, *supra* note 27, at 964 (emphasis added). There are two problems with Professor Redish's response. For one thing, even if he were right about the nature of the "linguistic" issue, his conclusion would be questionable, because it rests on the peculiar assumption that words have single meanings and, thus, can be understood as independent entities, without any reference to the purposes with which they were uttered. We wonder what he would say about the constitutional command, "*Congress* shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I (emphasis added). Would he say that the first amendment is confined to denials of free speech by the Congress and is "linguistically incapable" of extending to identical denials by the executive and judicial branches of government? Or would he say that the term "Congress" must be construed more broadly to achieve its intended purposes? If the latter, then what objection does he have left to the suggestion that the term "Acts of Congress" in the Rules of Decision Act be broadly construed to include federal common law?

The more serious problem is that Professor Redish begs the very question at issue: he *assumes* that the "linguistic" question is to decide whether federal common law is an "Act of Congress" within the meaning of the Rules of Decision Act. That is not the question at all. The question is *not* whether "Acts of Congress" should be deemed to include federal common law, but whether the explicit enumeration of federal law in the Rules of Decision Act is *exclusive*—a question on which the Rules of Decision Act is entirely silent. Being silent, the Act is incapable of providing a "linguistic" answer to the question. That is to say, since the real question is whether or not the Rules of Decision Act's enumeration of federal laws is exclusive, and since that is a question that the Rules of Decision Act does not address, the solution cannot be found in the language of the Act. Rather, it must be found in the policies underlying the Act—all of which point toward including federal common law.

(Our Version of the Rules of Decision Act)	(Professor Redish's Version of the Act)
The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress *or federal common law* 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.	The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress *or federal common law* 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. *Provided, however, that the federal courts shall not fashion or apply any federal common law of procedure in diversity cases in the face of state rules to the contrary, unless the federal interests furthered by such judge-made rules outweigh the state interests underlying the state rules to the contrary.*[63]

The choice is yours to make. As for ourselves, we can think of only one reason why Professor Redish would strain to maintain a toe-hold on the Rules of Decision Act: because he committed himself to it three years ago and now feels he must defend it, at all costs.

63. For the extent to which this proviso, properly understood, works to undermine the very thesis Professor Redish wishes to advance, *see* note 54 *supra*.