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***860** THE CURIOUS NOTION THAT THE RULES OF DECISION ACT BLOCKS SUPREME FEDERAL COMMON LAW[*]
83 Nw. U. L. Rev. 860 (1989)

Louise Weinberg[**]

Abstract

This article served as a rebuttal in a date with my admired friend and colleague, Martin Redish. I tried to make the point that that, whatever the Rules of Decision Act meant when it was enacted, the Supremacy Clause and the post-*Erie* understandings, meant that federal case law was supreme federal law where it applied. It is the common experience of lawyers and judges that one does not disregard a Supreme Court decision on the federal question to which it applies, any more than one would disregard a decision of the Supreme Court of California on the California question to which it applies. The right law is the relevant law.

***860** THE CURIOUS NOTION THAT THE RULES OF DECISION ACT BLOCKS SUPREME FEDERAL COMMON LAW[*]
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In the pages of this *Review*, Professor Martin Redish has tried to clarify his long-held view that nonstatutory federal law is illegitimate.[1]

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He now pitches his position, unequivocally but implausibly, on the Rules of Decision Act.[2] However "legitimate"--indeed, ordinary and unavoidable--some writers may think the decision of federal questions under federal law, there are a good many people who somehow manage to share Professor Redish view to the contrary. But I do not think many of them would share his view that the Rules of Decision Act is what determines the supposed illegitimacy of federal case law.[3] It is

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1 Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989).

2 28 U.S.C. § 1652 (as revised in 1948). C. WRIGHT, THE LAW OF FEDERAL COURTS 347 (4th ed. 1983) ("The statute has remained substantially unchanged to this day."). For the original text of the statute, § 34 of the Judiciary Act of 1789, 1 Stat. 92, as well as the current version at 28 U.S.C. § 1652 (1988), see *infra* text following note 27.

3 "'The statute, however, is merely declarative of the rule which would exist in the absence of the statute.'" Erie R.R. v. Tompkins, 304 U.S. 64, 72 (1938) (citation and footnote omitted); *cf.* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 368-69 (1952) (Frankfurter, J., dissenting in part and concurring in part) ("a derelict bound to occasion collisions on the waters of the law"); *see* Westen, *After "Life for* Erie*"--A Reply*, 78 MICH. L. REV. 971 (1980) (Act should be read as including federal common law in "except" clause. *But see* Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 963-64 (1980) (replying to Professor Westen). *See also* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n. 13 (1983) (Rules of Decision Act inapplicable in filling gaps in interstices of federal statutes). *But see* Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Westen and Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980). Professor Ely has found force in the Rules of Decision Act in the context of federal procedure in conflict with state policy. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974). *But see* Stewart Org., Inc. v. Ricoh Corp. 108 S.Ct. 2239 (1988) (federal law controls effect of forum-selection clause in case transferred under 28 U.S.C. § 1404(a), over dissent arguing that the Rules of Decision Act compels state-law governance of the issue). *See id.* at 2245 (Scalia, J. dissenting).

the Act's bicentennial year, but celebration of this magnitude seems excessive.

How could a writer of Professor Redish powers come to entertain such a position? The question is important because if Professor Redish ***861** thinks the Rules of Decision Act somehow prevents courts from fashioning federal answers to federal questions,[4] there is fundamental confusion that needs sorting out.

THE DIFFERENCE BETWEEN "FEDERAL COURTS LAW" AND FEDERAL COMMON LAW

I suspect, and have suggested elsewhere,[5] that these sorts of misunderstandings arise, in significant part, because teachers of civil procedure have become the intellectual custodians of *Erie Railroad Co. v. Tompkins*.[6] Their quite natural preoccupation with rules of procedure

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4 Professor Redish purports to make a distinction between judicial lawmaking interpreting authoritative text, and freestanding judicial lawmaking. The strictures of the Act, in his view, apply only to the latter. Authorities who, with Redish, have taken the Act to restrict federal common law include P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 62 (1970); Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1, 27-32 (1985). Professor Burbank has recently argued that the Act governs even the filling of interstices in federal statutory law. Burbank, *supra* note 3, at 704; *accord* Westen & Lehman, *supra* note 3. Professor Kane confines her recent discussion of the Act to its more usual position as compelling state "substantive" law on arguably procedural issues in federal courts, as does Professor Ely, *supra* note 3. Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988). Professor Wright finds the effect of the Act upon federal common law unclear. C. WRIGHT, *supra* note 2, at 388.

5 *See* Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 828-29 (1989).

6 304 U.S. 64 (1938).

explains their fascination with the line of cases the Supreme Court decided in the wake of the 1938 Federal Rules of Civil Procedure. For half a century even federal courts casebooks[7] have been bogged down in these cases, cases we all now think of as "the *Erie* doctrine." The question these cases raise is the obvious post-*Erie*, post-Rules question: "What happens when application of a federal procedural rule would undercut some state substantive policy?" Convinced by now that we have to read these cases over and over, we tend to forget that no federal procedural rule was at issue in *Erie*. That case had nothing to do with the problem of "substance" versus "procedure." The question is interesting enough, as far as questions of civil procedure go, but, vis-a-vis *Erie*, it is only a side issue.[8]

Somehow what may have begun as misplaced emphasis has become profound error.[9] The benighted but pervasive conclusion has been that, in the absence of authoritative text to the contrary, judicial decision of ***862** federal questions is somehow improper, or at best tolerable only as exceptional to some general post-*Erie* proscription.

I raise this derailment of *Erie* for three reasons. First, I think it explains the theoretically inappropriate concentration by Professor Redish and others on what happens *in federal courts*. Second, that

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7 For the magnitude of the misplacement of emphasis in the past, compare, *e.g.*, the first and second editions of HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953) and (2d ed. 1973) with the third (3d ed. 1988), now available. *See generally* Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688 (1988). Professor Wright's indispensable THE LAW OF FEDERAL COURTS 1095 (4th ed. 1983) contains a single index entry under *Rules of Decision Act:* "See Erie Doctrine."

8 *See* Weinberg, *supra* note 5, at 828-29 ("rather dreary little side issue"). The "side issue" was first raised by Justice Reed, dissenting in *Erie*, 304 U.S. 64, 89 (Reed, J., dissenting).

9 For a brief historical overview, see Weinberg, *supra* note 5, at 822-32.

concentration, in turn, sheds light on a further question. How did it come to pass that even skillful commentators can read the Rules of Decision Act, limited in application by its own language to *federal courts only*, as controlling the availability of federal common law? After all, federal common law is supreme in both sets of courts. Third, for those perceptive authors who, like Professor Redish acknowledge that *Erie* is no help to them in delegitimizing federal case law, this background may explain their odd view that this uninteresting statute has become the only line of defense against judicial lawmaking encroachments upon American democratic values.[10]

There is an enormous practical difference, however, between the "*Erie*-doctrine" cases and other federal-law cases. For the most part, federal procedural law is not substantive federal law binding on the state courts under the supremacy clause.[11] It is true that federal procedural case law (though often text-based) does bear a superficial resemblance to the pre-*Erie* "federal general common law." Both can be described as "federal courts law,"[12] and neither can be described us substantive federal law binding on the state courts under the supremacy clause. For this reason, disparaging remarks about the pre-*Erie* "federal general common law" can be made to seem not entirely inapposite to the post-*Erie* procedure cases. Any rules applicable in one set of courts

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10 *See* Redish, *supra* note 1, at 766 n. 19.

11 *But compare* Southland Corp. v Keating, 465 U.S. 1 (1984) (Federal Arbitration Act, requiring federal courts to enforce arbitration clauses in all contracts in interstate commerce, is substantive federal law and must be enforced by state courts as well as federal) *with* Prima Paint Corp. v. Flood & Conklin Mfg. Corp. 388 U.S. 395 (1967) (Federal Arbitration Act, requiring federal courts to enforce arbitration clauses in all contracts in interstate commerce, is federal procedural law applicable in federal diversity courts even though state law forbids such enforcement).

12 For the phrase "federal courts law" I believe I am indebted to Don Trautman.

and not the other will generate forum shopping and dissimilar outcomes. But one cannot--without getting thoroughly muddled--transfer these disparagements to the entirely different sort of law that is fashioned by courts when a substantive federal question is raised. Because substantive federal case law is supreme law in all courts,[13] it will not generate forum shopping or disparate outcomes.

***863** It might be said to all of this that the Rules of Decision Act makes no such distinction between "federal courts law" and "federal common law;" it mandates resort to state law whenever an issue of nontextual law must be decided by a federal court.[14] But the distinction between I have been trying to draw is in fact fully appreciated by the Act's most loyal fans. In *Stewart Organization, Inc. v. Ricoh Corp.*,[15] holding that federal law governs the effect of a forum-selection clause on federal transfer of a state-law case, Justice Scalia was the sole dissenter, relying in part on the Rules of Decision Act.[16] Even Professor Redish might not apply the Act in a case in which the Court arguably was construing an authoritative federal text--here, the transfer

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13 *See, e.g.*, Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) (Pennsylvania court must apply federal common-law rule to case that could have been brought in admiralty); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (in diversity case, federal law must govern preemptively the question whether American courts can examine act of a foreign state, notwithstanding that federal rule is a rule of common law only, and notwithstanding that state law would yield the same result). *See generally* C. WRIGHT, *supra* note 2, at 273 (citing Free v. Bland, 369 U.S. 663 (1962)).

14 See Justice Scalia's argument to this effect in Stewart Org., Inc. v. Ricoh Corp., 108 S.Ct. 2239, 2248 (1988) (Scalia, J., dissenting).

15 *Id.* (federal courts have power to determine the validity of a forum-selection clause in contract between parties to an antitrust case transferred under 28 U.S.C. § 1404(a), as a matter of statutory interpretation of § 1404(a)).

16 *Id.* at 2245 (Scalia, J., dissenting).

statute. We can fairly say, then, that Justice Scalia has top credentials as one who takes the Act seriously; he is, in fact, the only member of the Supreme Court who takes it this seriously. Nonetheless, in the same term in which *Ricoh* was decided, Justice Scalia wrote the majority opinion in *Boyle v. United Technologies Corp.*,[17] fashioning a new federal common-law defense to a state-law tort. Justice Scalia did not even mention the Rules of Decision Act. Even the two dissents in *Boyle* did not mention it.[18]

The difference between *Ricoh* and *Boyle* is that, while the issue in *Ricoh* was one of "federal courts law," and thus conceivably referable to state law under the Act, the issue *in Boyle* was one of genuine federal common law. The rule of *Boyle* is now supreme in all courts. Under the supremacy clause, all judges, federal and state, trial and appellate, are sworn to uphold federal law and the Constitution of the United States.[19] The Supreme Court has review jurisdiction over both sets of courts in important part to hold them to that oath. Supreme federal law includes federal case law, as well as statutes and the Constitution.[20] (Actually, it is somewhat misleading to put it like this. Authoritative

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17 108 S.Ct. 2510 (1988) (Scalia, J.).

18 *Id.* at 2519 (Brennan, J., dissenting); *id.* at 2528 (Stevens, J., dissenting).

19 The supremacy clause provides:

> Th[e] Constitution and the Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby....
>
> [A]nd all...judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution....

U.S. CONST. art. VI, cl. 2, 3.

20 *See supra* note 13.

exposition of the Constitution or federal statutes ultimately occurs in cases; and, in any event, all law in courts is case law, in the sense that an interpretation of a statute by a court becomes a rule of that case.[21]) Genuine, unambigu- ***864** ously *federal* case law seems to have been understood as supreme law in American courts both before and after *Erie*.[22]

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21 The argument is spelled out more fully in Weinberg, *supra* note 5, at 834-36; *see also* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986); Merrill, *supra* note 4, at 2-3, 6; Westen & Lehman, *supra* note 3, at 332. On the question whether constitutional interpretation is also "common law," compare Weinberg, *supra* note 5, at 807 (all decisions of federal questions are federal common law) with Monaghan, *The Supreme Court, 1974 Term--Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (distinguishing "constitutional law" for "constitutional common law" as not subject to Congressional override) and Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (distinguishing all cases of constitutional interpretation from "common law").

22 With the establishment of the principle of Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) Supreme Court has power to review state cases insofar as questions of federal law are presented), Supreme Court rulings have always been understood to be federal law binding in all courts. There were three major exceptions: (1) cases fashioned for federal courts only under the general federal common, as authorized in Swift v. Tyson; (2) cases decided under the doctrine of "equitable remedial rights" (*see* Pusey & Jones Co. v. Hanssen, 261 U.S. 491 (1923); von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. Pa. L. Rev. 287 (1927); *see also* Guffey v. Smith, 237 U.S. 101 (1915)); and (3) cases exclusively concerned with federal procedure.

Clarified federal questions were coming up through the state courts both before and after the Civil War, to receive supreme and binding Supreme Court review. Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875) (despite postbellum change in wording of jurisdictional statute, Supreme Court would continue to review state cases only insofar as they contained federal questions). The inevitable ambiguity in the source of Supreme Court rulings under the above-enumerated exceptions did delay recognition of the federal nature of some important areas of federal case law. Federal admiralty case law was held supreme in all courts as late as 1917, although well before *Erie*. Southern Pac.

Professor Redish denounces federal case law as illegitimate under the Rules of Decision Act unless the court is focusing on some text to determine its meaning.[23] For him the Act outlaws freestanding federal case law. He correctly does not cite Professor John Hart Ely's famous essay, *The Irrepressible Myth of* Erie.[24] There, Professor Ely also argued that the Rules of Decision Act provides significant protection for state policy in federal courts, protection that *Erie* does not. But Professor Ely was concerned in that essay, like Justice Scalia in *Ricoh*, not with substantive federal common law, but with modern federal *courts* law. He was writing about the "*Erie* doctrine," about the sort of conflict between federal procedure and state substance likely to arise in a typical diversity case, a case otherwise obviously governed by state law. Professor Ely's subject was *Hanna*, *Ragan*, and *York*.[25] It was not *Clearfield Trust*, *Sab-* ***865** *batino*, or *Borak*.[26] It is only in the *former*

Co. v. Jensen, 244 U.S. 205 (1917). The *Jensen* position was re-affirmed after *Erie*. *See supra* note 13; Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (federal diversity court must apply federal common law in case that could have been brought in admiralty).

23 *See generally* Redish, *supra* note 1.

24 Ely, *supra* note 3.

25 Hanna v. Plumer, 380 U.S. 460 (1954) (when clear federal rule is on point federal diversity court should apply it despite conflicting state rule; FED. R. CIV. P. 4(d)(1) governs manner of service of process in federal court); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (federal diversity court must follow a state rule that statute of limitation runs until service of summons on defendant, notwithstanding FED. R. CIV. P. 3, providing that a civil action as commenced upon filing the complaint); Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (state statute of limitations controls limitation of federal diversity action equitable in nature).

26 J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (action will lie at federal common law for violation of a rule promulgated by the Securities and Exchange Commission); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal common law furnishes defense to action seeking to examine legality of

context that the Rules of Decision Act could conceivably have bearing, addressed as the Act is to federal courts only.

I am reminded of the British Rail conductor who orders a dignified matron off the train after he notices she is clutching an open tea-caddy containing her little pet turtle. "But why pick on me?" she asks him. "People are always allowed on with their pet dogs." To which he patiently replies, "Madame, dogs is 'dogs.'. And cats is 'dogs.' But turtles is 'hinsects.'" Professor Redish, having developed his understanding of the Act in previous studies of the procedure cases,[27] turns this turtle into "hinsects."

GLEANING WHAT ONE CAN FROM TEXT AND BACKGROUND

The current version of the Act says:

> 1652. State laws as rules of decision.
>
> 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.

A literal reading of the Act today produces meaning very different from that extracted from it by Professor Redish. The Act expressly

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expropriation by foreign sovereign, notwithstanding that case is between private parties, is in diversity jurisdiction, and that state law would give same result; the foreign relations law of the United States must be federal law, as must the allocation of competence between the federal executive and judiciary to scrutinize acts of foreign states); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal common law governs rights and obligations of United States on its own commercial paper).

[27] *E.g.*, Redish & Philips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

mandates state law *except* as the Constitution otherwise "requires."[28] When the supremacy clause requires courts to interpret or fashion federal case law, the Act does not purport to mandate anything else. For all Professor Redish's insistence upon the Act's language, he glosses over important wording about what the Constitution requires.

Nevertheless, it is certainly true that the Act contains no reference to decisional law (either federal or state). The original version of the Act, section 34 of the First Judiciary Act of 1789, read:

> Sec. 34. *And be it further enacted*, That the laws of the several states, except where the constitution, treaties or statutes ofthe United States shall ***866** otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Professor Redish probably would say that the language "laws of the several states" could fairly be interpreted to include decisional law--as Justice Brandeis says it must in *Erie*--in a way that "the Constitution" or "Acts of Congress" could not. One answer to this is that the phrase could also fairly be interpreted to *exclude* decisional law--as Justice Story said it did in *Swift*.[29] Story was, of course, much closer in time to

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28 Curiously, I do not find scholarly discussion of the meaning of the words, "except where the Constitution...otherwise require[s]". *But see* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 903 (1986) (raising the question). Professor Redish's interpretation omits reference to this language, and focuses exclusively on the interwoven works, "except where...Acts of Congress otherwise...provide." Redish, *supra* note 1, at 786.

29 *See* C. WRIGHT, *supra* note 2, 347 ("The central question has been whether the decisions of state courts are 'laws of the several states' within the meaning of the statute...."). In interpreting these words in *Swift*, Justice Story did not refer to legislative history. He simply said that it "never ha[d] been supposed" that the phrase "laws of the several states" included state case law. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). In rejecting Story's interpretation,

the drafting of the Act than Brandeis. But the even shorter answer, it seems to me, is that it is not possible, as a practical matter, to glean anything that would translate living law out of the skewed understandings of the common law that informed the 1789 Act.

It is time to face up to the fact that the Act comes down to us as a relic of a prepositivist, prerealist time, with scant relevance for us today. There was very little clarity about the sources of common law in 1789. As Justice Brandeis explains in *Erie*, American lawyers believed that common law was "general" law, without any authoritative source behind it.[30] The common law of the several states seemed to them, in those days, largely to be the *general* common law,[31] and, generally, neither a special Virginia common law nor a special federal common law would have been a comfortable concept for them. A special Virginia common law was conceivable to them, on issues of purely local concern--as Justice Story explained in *Swift*.[32] An independent federal common law was conceivable to them also on issues of exclusively federal concern. But there seemed few such issues then; the scope of national governance was small and the power of the nation

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Justice Brandeis in *Erie* relied on a previous draft of the Act referring to "unwritten" law in "common use" by the states, a draft discovered by Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923). But the draft is today generally considered inconclusive, given its rejection by Congress. *See*, *e.g.*, Friendly, *In Praise of* Erie*--and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389-91 (1964).

30 Erie. R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938).

31 *See generally* Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of* Marine Insurance, 97 HARV. L. REV. 1513 (1984); Gibbons, *Federal Law and the State Courts, 1790-1860*, 36 RUTGERS L. REV. 399 (1984); Jay, *Origins of Federal Common Law--Part One*, 133 U. PA. L. REV. 1003 (1985) (Jay I).

32 Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).

not fully understood. Federal common law would have been received only grudgingly or intermittently.[33] There was pervasive post-revolutionary fear of any governance superior and exterior to that of the several states. Then, too, there was the Anti- ***867** Federalists' fear of federal impingement upon states' rights. These fears retain resonance for us today, despite shifting contexts. But eighteenth century views are too remote from our current understandings of the nature of common law to have salience for us.

I am saying that the failure of the Act to deal with the common law, federal or state, is simply without any modern meaning. Now that post-Erie positivism has cleansed American courts of law lacking an identifiable sovereign source,[34] now that all substantive federal case law--free-standing or otherwise--is clearly the supreme law of the land, there is nothing the Rules of Decision Act says, or does not say, that need frustrate that supremacy.

Professor Redish is so focused on Congress' apparent refusal to authorize federal common law that he disregards--in fact, never even mentions--the two portions of the Act which could save it from utter eclipse. As we have see, he disregards what could be read as the prime directive--that the law the Constitution "requires" should govern. In addition, he disregards the way the obligation to use state laws is *qualified*: that state laws be used as rules of decision only "in cases

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33 *See*, *e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834) (no federal common-law copyright). *But see* Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222-23 (1818).

34 *But see* the curious anomaly of Georgia, apparently never challenged on constitutional grounds. *Cf.* Frank Briscoe Co. v. Georgia Sprinkler Co., 713 F.2d 1500 (11th Cir. 1983) (contract); Rees, *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 789-90 (1983). I am indebted to Russ Weintraub for calling my attention to this oddity.

where they [the laws] apply."[35] Nothing in this neatly tautological legislation tells us state laws must be applied where they do *not* apply--and state law does not apply where federal case law is supreme. The Act is quite explicit that state law does *not* apply where the Constitution "otherwise requires." Far from establishing any sort of presumption in favor of state law, the Act itself expressly defers to constitutional requirements to the contrary. Within its own eighteenth-century framework, fairly read, the Act seems intended to codify (as Justice Brandeis said in *Erie*) whatever general understandings would have obtained anyway. Those understandings were very likely the understandings described by Justice Story in *Swift*, and rejected by Justice Brandeis in *Erie* because they rested on a fallacious, prepositivistic notion of the nature of the common law.

THE ARGUMENT TO THE CONTRARY AND WHY IT IS MISTAKEN

The argument under the Rules of Decision Act is framed more explicitly by other writers,[36] and although they do not share Professor Redish's narrow conclusion, I think he would agree with their reasoning. They argue that Congress has power to say what the content of any item ***868** of federal law will be, to waive federal supremacy, and to incorporate state law or defer to state governance. In the Rules of Decision Act, they argue, Congress has consciously and literally adopted state common law instead of federal common law. Thus, the Act is *the* referent when federal judges must choose. Whenever federal courts must decide issues at common law, whether procedural or substantive, they

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35 Professor Redish has acknowledged elsewhere that the final clause of the Act suggests that state law does not apply where federal law does. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 81 (1980); *see also* Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1168 (1986).

36 *E.g.*, Burbank, *supra* note 3, at 704. *See generally* Westen & Lehman, *supra* note 3.

choose state law precisely because the Act directs them to. The Act makes it unnecessary, in this view, to refer for guidance to *Erie*, the powers of Congress, the tenth amendment, or even the jurisprudence of comity and federalism.

One of the many troubles with this tidy argument is that it is profoundly ahistorical. The nature of independent and supreme federal common law has become clarified only in modern times. There was little or no clearly understood federal common law for the first Congress to reject, and we have no indication that subsequent rectifiers of the Act were alert to the culture changes we now discern.

In any event, this interpretation of the Act is unadministrable. If the Act is read as deliberately substituting state common law for federal common law, but only when the federal law in question would not involve interpretation of some authoritative federal text, judges would have to draw a line between statutory construction and freestanding federal common law. There is no such distinction. Of course, it is possible to construct hypothetical clear examples at the polar extremes of this supposed dichotomy. But, given the general obligation of courts to defer to legislatures, most common law is fashioned after consideration of the presence or absence, repeal or rejection, or analogous coexistence, of legislation.[37] And, given the general tendency of courts to avoid impolitic resolutions, most common law, even in clearly text-based cases, will tend to give general policies some play.[38] There is no dichotomy; there is only a complex continuum.

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[37] *E.g.*, Mobil Oil Co. v. Higginbotham, 436 U.S. 618 (1978) (existing federal common-law cause of action for wrongful death on navigable waters does not extend to deaths occurring on the high seas, because the common-law remedy might upset the balance struck on various issues in the Death on the High Seas Act).

[38] *E.g.*, Hellenic Lines, Inc. v. Rhoditis, 398 U.S. 306 (1970) (seamen's statutory tort remedy against employer extends to alien employer with base of operations in this country; to hold otherwise would put American employers at competitive disadvantage with alien employers operating in this country).

Both the Constitution and Acts of Congress involve courts in problems of textual and intentionalist interpretation. Although constitutional text is obviously more authoritative than statutory text, some constitutional cases seem much closer on the continuum to "pure" common-law adjudication than to cases of statutory interpretation.[39] In short, the ***869** sharp distinction called for simply cannot be made. Witness Professor Redish's own heroic, but futile, struggle with this problem.[40]

More seriously, it is hard to see how the Act can have the argued effect on otherwise supreme federal common law. The Act, after all, is addressed to *federal courts only*. Indeed, this feature of the Act paradoxically stands in the way even of the position that the Act has exclusive governance in *federal* courts of the choice between federal and state decisional rules.

These points require extended development, and I have put it into the Section that follows, in the course of going through a most illuminating exercise. My attempt is to take the Act as seriously as its admirers would like, in order to discover the systemic and institutional consequences of doing so.

TAKING THE RULES OF DECISION ACT SERIOUSLY AND REGRETTING IT

As we have seen, Professor Redish and other authors, while treating the Rules of Decision Act as wholly determining the allocation of common-law power between the nation and the states, place great

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39 *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (plaintiffs are deprived of constitutional right within the meaning of the Civil Rights Act of 1871 and the fourteenth amendment when required to attend racially segregated public schools; their separate education can not be equal to an integrated one, since it causes intangible injuries to them).

40 *See* Redish, *supra* note 1, at 785-95.

emphasis on some textual features of the Act while disregarding others which could give it a much more natural and modern meaning.[41] Oddly, proponents of such views seem willing to read all sorts of *additional* things into the Act, things to which the Act makes no reference at all. As we have already seen, Professor Redish is willing to assume, as one must after *Erie*, that the phrase "state laws" in the Act now embraces decisional laws. But I think he, and these others, must also be reading a good deal more into the Act.

Consider, for example, that the Act is addressed to federal *trial* courts only. In the original Act, Congress does not refer to "civil actions." That term is adopted by the 1948 revisers of the judicial code from the "merged" 1938 Federal Rules of Civil Procedure.[42] The original language of the Rules of Decision Act referred instead to "trials at common law in the courts of the United States."[43] In either version, the Act is *silent about appeals in the United States intermediate appellate courts and petitions for review before the Supreme Court*. So these authors simply are reading into the Act its necessary effect upon the higher federal courts. They must comprehend that the original draftsmen could not have intended anything by this omission. The Act would be an absurdity if federal appellate courts could apply rules of decision unavaila- ***870** ble in civil actions in trial courts. One must infer that federal appellate as well as trial courts are debarred from any other law than state law in cases where state law applies, under any reading of the statute.

The original limitations to actions at "law" has also faded into history. The term "civil actions" includes every federal suit, whether at law, in equity, or (after 1966) in admiralty. But had the original language ("trials at common law") survived revision, I have no doubt that these authors

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41 *See supra* notes 28-35 and accompanying text.

42 FED. R. CIV. P. 1, 2.

43 *See supra* text following note 28. *See* also C. WRIGHT, supra note 2, at 347 ("The statute has remained substantially unchanged to this day.").

very sensibly would have inferred similar directives for equity and for admiralty. They would have done so not because the original drafters would have seen the necessity for that--they would not--but because our modern understandings take the drafters' reasoning beyond any relevance for us. The modern position is that a particular interested state's law (or a particular interested foreign country's law) applies on a particular issue, in equity as at law, in a head of federal-question jurisdiction, or in admiralty, as in diversity--or in state courts, for that matter--but only when supreme federal law does not apply.

Finally, for this very reason it is exceedingly awkward in trying to make modern sense of the Act that, by its own terms, it has no application to *state* courts. The Act must be taken as consistent with the background of state-court obligations as well as those of federal courts. In the real world, when state common law applies, it applies in all American courts, just as, when federal common law applies, it applies in all American courts.

It is in fact this point--the express limitation of the Rules of Decision Act to federal courts only--that reveals how much more thinking about the Act has to be done by those who fancy that it somehow delegitimizes federal common law.

To read the Act, with this limitation on it, as delegitimizing federal common law, one would have to believe that federal courts are the sole repositories of federal common-law power. Professor Redish sometimes does seem to believe this. He repeatedly speaks of federal common law as fashioned by the "federal judiciary."[44] This is a common slip, and perhaps does not reflect his true views. As we have just reminded ourselves, and as the Constitution requires (and as the Act itself seems cheerfully to confirm), all courts must work under federal common law when the supremacy clause so "requires." It would help if one could suppose that by his references to the "federal judiciary" Professor Redish simply means

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44 Redish, *supra* note 1, at 765-66, 783, 792, 804. *But see* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976).

to say that *the Supreme Court*, a federal court, is the final arbiter of federal common law. Disregarding the Act's awkward limitation to trial courts, as we must in any event, we can accompany Professor Redish this far in his thinking.

But, at the same time, in a remarkably acrobatic piece of double- ***871** think, Professor Redish, and others who resort with nearly equal absolutism to the Act, want us to believe that *state* courts are the sole repositories of federal common-law power. That is because the Rules of Decision Act--according to them--prevents federal judges from deciding federal questions by fashioning federal common law. Nor does the supremacy clause--according to them--force federal common law, when applicable, on federal courts. That is because, as they argue, either the Act itself intervenes, adopting state common law instead, or because--and this latter view I believe is unique to Professor Redish--the supremacy clause speaks only to state judges(!)[45]

The upshot, then, in Professor Redish's America, is that, under the Rules of Decision Act, federal common law may apply in state courts, but only state common law may apply in federal courts. This crisscross arrangement may seem neither natural nor sensible, but it seems to be the direction in which Professor Redish's thinking will carry one. Yet, surely the same decisional law applies in both sets of courts: state common law, when applicable, under the principle of *Erie*; federal common law, when applicable, under the supremacy clause. If not, how would courts avoid the very problems of forum shopping and disparate outcomes that arose under *Swift v. Tyson*?[46]

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45 *See* Redish, *supra* note 3, at 960.

46 *See*, *e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 411 (1953) ("Thus, we are asked to sue the Erie-Tompkins case to bring about the same kind of unfairness it was designed to end.") (Black, J.).

Perhaps what is meant is that federal questions can be answered in *both* sets of courts only by the fashioning of *state* common law.[47] If so, that demolishes the supremacy clause--even Professor Redish's own odd reading of it. Although Professor Redish has said that the supremacy clause does not apply in federal courts, he has never said that it does not apply in state courts.

What may be blocking Professor Redish's full appreciation of the supremacy of federal law in state courts could be the peculiarity of the decisional process in those frequent cases in which there is little or no existing federal decisional law on an issue, but in which a court is about to fashion some. These are cases in which there is no law to "apply." Often, the new rule would be the first *federal* rule on the question. In this "prefederalized moment" (as I have called it[48]), one has to draw upon American legal realism and American post-*Erie* positivism before ***871** one can more clearly appreciate that common law, before an issue is decided, is *inchoate*.[49] A court in this country must identify the sovereign whose legitimate governmental interest is invoked when it decides any issue of law.[50] Thus, before a court may federalize an issue, it needs to

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47 Here they are in the distinguished company of Justice Holmes. *See, e.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (arguing that the common law "always is the law of some state") (Holmes, J., dissenting). *Jensen* was an admiralty case, and Holmes was wrong, of course, in that context. Indeed, this part of his famous *Jensen* dissent is no better law today in a typical diversity case than in a typical admiralty case. Whenever an issue of federal law arises, it is federal law that decides it. Of course, federal common law may incorporate state law to supply the particular rule of decision.

48 *See* Weinberg, *supra* note 5, at 816.

49 For a fuller statement of the position, see Weinberg, *supra* note 5, at 832, 836.

50 This can be seen as the broader holding of *Erie*. It is also the consistent holding of the Supreme Court in reviewing state choices of law. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Clay v. Sun Ins.

ascertain that the national interest requires it to do so. A court also needs to reason from policy, inchoate state or federal policy, to decide what the state or federal rule should be. *Law is always coming into being*. Thus, before federal common law is fashioned for a case, *all that can be said to be supreme under article VI is inchoate federal policy*. But it is supreme nevertheless.

Because of the difference supremacy makes, an American judicial system built on the unlikely foundation of the Rules of Decision Act simply could not work. Suppose, for example, that a products liability case is brought in an Ohio state court. An injured federal civil servant sues, under Ohio tort law, the manufacturer of a defective stapler sold to the government. The manufacturer pleads a defense of "government contractor immunity" as a matter of federal common law. Such a defense is unknown under Ohio law, does not exist under any act of Congress, and has never been addressed by the Supreme Court. Suppose the state court decides the question, fashioning law for the case.

The Ohio trial court reasons by analogy to the recent Supreme Court case of *Boyle v. United Technologies Corp.*,[51] a suit against a government defense contractor. The Ohio court holds that a nonmilitary federal government contractor should enjoy immunity from suit by a federal employee, as a matter of federal common law. It rejects the argument that the question posed in one of state law. It also rejects the argument that the question posed is one of general common law, although numerous commentators (wrongly) believe that state courts have plenary general

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Office. Ltd., 377 U.S. 179 (1964); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). *See generally* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

51 108 S.Ct. 2510 (1988). For a critique of *Boyle*, *see* Weinberg, *Federal Courts: Forum for Public Interest Litigation*, in FEDERAL COURTS: PRESENT ROLE IN FUTURE PERSPECTIVE (forthcoming).

common-law powers denied to federal courts.[52] Thus, the state court has fashioned a new federal common-law defense. The defense is federal because it has been fashioned to protect national ***873** interests in government procurement, and because the state court has expressly identified it as federal.

We know the Supreme Court must have jurisdiction to review the decision, either on the existence of the federal defense, or on the merits. Suppose that this decision is affirmed by the highest state court, and that there is no petition for review in the United States Supreme Court.

Now, suppose that in the following year, the same question if presented in a diversity case in federal court in the same state. In Professor Redish's America, the federal trial court, under the strict command of the Rules of Decision Act, is unable to federalize a freestanding issue of national policy until Congress has spoken. Nevertheless, the federal court here must apply the rule just fashioned by the Ohio court; the state court, after all, would apply it. It must do so as a matter of Ohio law because it lacks power to apply federal common law. In consequence, the Supreme Court would have no jurisdiction to review the decision!

This denouement is startling. It would free federal courts to fashion whatever federal law they liked, on the theory that the state court "would" do the same.[53] Effective Supreme Court review of judicial federal

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52 This common fallacy is laid to rest (I hope) in Weinberg, *supra* note 5, at 819 ("*There is no general state common law, either*.") *But see* Field, *supra* note 21 at 899. *See also* the instance of Georgia, *supra* note 34.

53 *Cf*. *In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 690 (1984) (Weinstein, J.) (all courts would apply "national consensus law" on issues of product liability in suit brought by war veterans against manufacturers of defoliant allegedly causing genetic and other personal injuries); Sun Oil Co. v. Wortman, 241 Kan. 236, 755 P.2d 488 (1987) (all concerned states as a matter of their own law would apply same federal interest rate that Kansas would),

lawmaking could be had only in cases coming up through the state courts.[54] I do note think Professor Redish really wants this result.

In the real world, both state and federal courts would decide the issue under federal law because, under the supremacy clause, they would hold themselves obliged to. They would do so just as they decide any other federal question of first impression. We know that this federal decisional exigency is compelled by the supremacy clause in both sets of courts. Nothing in the Rules of Decision Act gets in the way of this perception. The Act expressly mandates state law *except* as the Constitution otherwise "requires." When the supremacy clause requires federal law, the Act does not purport to mandate anything else.

IS IT THE RULES OF DECISION ACT THAT KEEPS THE PILLARS OF THE REPUBLIC STANDING?

Even a sophisticated understanding of these realities may not be enough to convey a sense of the inevitability, legitimacy, and propriety of federal decisional law. After all, the Supreme Court's own pronounce- ***874** ments tend to teach that federal common law is something exotic and exceptional, available only unpredictably.[55] One can easily convince oneself, as apparently Professor Redish has done, that if a legitimate federal common law existed the pillars of the Republic, separation of powers, democracy, federalism, and other good things would all come crashing down about one's ears. If one adds to

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aff'd, 108 S.Ct. 2883 (1988); Shutts v. Pillips Petroleum Co., 240 Kan. 764, 732 P.2d 1286 (1987) (same), *cert denied*, 108 S.Ct. 2883 (1988).

54 Effective review of federal questions might not be had even in state cases. State courts have power to incorporate a federal rule as state law. By identifying a rule as a state rule, they could effectually block Supreme Court review. *See* Michigan v. Long, 463 U.S. 1032 (1983).

55 *See* Weinberg, *supra* note 5, at notes 16-24 and accompanying text (collecting cases); *id.* at notes 129-52 and accompanying text (speculating on "What went wrong?").

these views the further belief, also entertained by Professor Redish, that *Swift v. Tyson* authorized judicial federal lawmaking, and that *Erie* delegitimized it again, one can begin to understand just why Redish has grasped so readily at the straw of the Rules of Decision Act.

In his mind, *Erie* might have kept the pillars of the Republic upright. In the lost, golden days just after *Erie* was decided, state law applied to everything, like some all-purpose poultice. But, alas, the Supreme Court has construed federal power--the power of Congress--so broadly that *Erie* has lost any constitutional force. The Supreme Court's expansion of Congress' commerce powers and erasure of the tenth amendment has drained the virtue out of *Erie*.[56] The continued verticality of the pillars of the Republic is maintained (whew!) only by the happy chance that the Rules of Decision Act is still on the books.

This is a very moving tale, but it is not accurate. *Federal* law was not applied under *Swift*, and *federal* law was not struck down in *Erie*. No *federal* law was in conflict with state law in either case. At issue in both cases was only a kind of state-like law, a second-guessed version, which the federal courts were applying instead of the state's own version. Federal courts were sitting, in a way, as superlegislatures of the states. *Erie* held, narrowly and neatly, that *state law is reserved to the states*. Only *federal* power could be exercised by the nation.

Erie's holding is stood on its head by those who think *Erie* delegitimized federal common law. They see the case as holding there is *no* common-law power alternative to that of the states. The case actually held that federal power was the *only* alternative power to that of the states, and that it is no business of the forum to distinguish between the cases and statutes of the governing sovereign. *Erie* did not take away any federal power, and nothing that happened later put it back. There being no imminent threat to the pillars of the Republic, no

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56 Redish, *supra* note 1, at 766.

shoring-up is needed, certainly not with so frail a support as the Rules of Decision Act.

THE NATIONAL INTEREST

More seriously, one will become hopelessly muddled if one goes on believing that it is the principled, bracing thing to do to let Wyoming or Mississippi, or no authority at all, govern issues of law invoking the na- ***875** tional interest in, let us say, the foreign policy of the United States, or the duty of President Nixon to turn over his tapes. Summoned back to the real world, one sees that the landscape of American *national* interest, as Dorothy said about Oz, does not look a bit like Kansas. The national interest does not easily submit to Kansas governance.

How does Professor Redish face up to the snarled empowerments in his America? With perception and candor. He has repeatedly exhibited understanding that post-*Erie* federal common law is co-extensive with the national interest.[57] But he imagines the command of the Rules of Decision Act to be so overriding as to make reasoning from the national interest just bad theory. That is an astonishing conclusion. It is a staggering one when accompanied by his further conclusion that the only theoretically sound way of distributing common-law power in this nation is by strict fidelity to a narrow, tautological, and obsolete statute. It becomes an incredible conclusion in the face of the sheer weight of authority to the contrary--all the federal common law we have got, in fact, all built upon the felt requirements of national governance.

Our libraries are full of federal case law, whatever the Supreme Court has said about limits on judicial federal lawmaking power. Apparently those limits are not taken sufficiently seriously by the American judiciary, and work of the fundamental and saving

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57 *See, e.g.*, Redish, *supra* note 1, at 796.

importance of the Rules of Decision Act has not yet reached the judges. What to do with all these illegitimate decisions? Professor Redish is torn between *stare decisis* and his fidelity to the Rules of Decision Act.[58]

Since, as we have seen, the Act need not be interpreted as in any way inconsistent with the supremacy of federal common law in cases in which it applies, and since, as we have also seen, the Act reflects a prepositivist and prerealist understanding of the nature of the common law and is therefore obsolete, this final little difficulty resolves itself.

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58 *Id.* at 801-03.