The Propriety of the Federal Common Law

Jeanne Proko-Elkins
THE PROPRIETY OF THE FEDERAL COMMON LAW

I. INTRODUCTION

One of the most widely misunderstood and misquoted Supreme Court decisions is Erie Railroad v. Tompkins.1 The confusion began as a result of Justice Brandeis' accurate, though incomplete, statement in Erie that there is "no federal general common law."2 While there is no federal general common law, Brandeis failed to add that there is a federal common law, as the case law so profusely illustrates.3 Unfortunately, the legal populace was unable to completely discern this distinction. Consequently, confusion surrounding federal common law was exacerbated by Justice Brandeis' opinion in Hinderlider v. La Plata River & Cherry Creek Ditch Co.4 which was handed down on the same day as Erie.5

1. 304 U.S. 64 (1938). In Erie, a railroad company was found liable for injury to a pedestrian caused by the negligent operation of its train. Id. at 69-70. The injury occurred on a much used path on the railroad's right of way along and near the rails. Id. at 69. The railroad company's liability in the diversity action, in the absence of a federal or state statute, was based on the decisional law of the state where the accident occurred. Id. at 70.

2. Id. at 78 (emphasis added). This phrase is often misconstrued to mean federal courts should not make common law. However, Justice Brandeis, author of the Erie opinion, did not intend such an interpretation. "[T]he same justice the same day in another case pointed out that there may be questions of 'federal common law' upon which state statutes and decisions cannot be conclusive, such as the apportionment between two states of the water of an interstate stream." Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L.J. 267, 273 (1946) (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938)).


4. 304 U.S. 92 (1938).

5. Id. Much of the confusion surrounding the propriety of the federal common law to exist at all as a doctrine involves the comprehension of the difference between federal general common law and federal common law. Prior to Erie's announcement that federal courts were to follow state law in diversity cases, federal judiciary displaced state authority as the "dominant force."7 T. Freyer, Harmony & Dissonance: The Swift and Erie Cases in American Federalism xiv-xv (1981). The federal justice action prior to Erie was known as federal general common law. Id. at xv. It was this federal general common law that Justice Brandeis denounced. Federal common law evolved from federal statutes and regulations, and "bound state tribunals because it was extrapolated from federal law and was therefore supreme." Id.

The term "federal common law" is used to refer to "any rule of federal [rather than state] law created by a court... when the substance of the rule is not clearly suggested by federal enactments." Field, supra note 3, at 890 (emphasis in original). The term "general federal common law" was what was outlawed in Erie, namely the formation of state law by federal courts in disregard of state common law.
The Hinderlider decision established that federal common law does exist as a body of decisional law developed by federal courts.6

In essence, federal common law is merely a "label pinned on a rule of law created by a federal court when it finds that an issue cannot be resolved directly by reference to the Constitution, a treaty, a federal statute or state law."7 Thus, a court is confronted with the question of whether to develop federal common law only when the issue before it cannot be resolved by direct application of federal legislation, a constitutional provision or a state statute. Interestingly, the courts have traditionally been hesitant to create federal common law.8 This judicial hesitancy can be traced to Justice Brandeis' enunciation of the principle of federalism in Erie. Justice Brandeis stated that the basic principle of federalism provides that federal courts cannot usurp the lawmaking function that ordinarily remains as a state duty.9 Yet, as one commenta-

law. Erie, 304 U.S. 64. For a further discussion of the doctrine created by Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), and overruled in Erie, see infra notes 42-53 and accompanying text.


7. Vairo, supra note 3, at 189.

8. See generally Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). In Texas Industries, the Supreme Court summarized the status of federal common law as existing "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States, or our relations with foreign nations, and admiralty cases." Id. at 641 (footnotes omitted) (federal common law was not created in this antitrust case because action did "not implicate 'uniquely federal interests' of the kind that concern the courts to formulate federal common law"). Id. at 642. For a fuller discussion of the narrow and broad approaches taken by courts in the development of federal common law, see Vairo, supra note 3, at 189 n.135.

9. Erie, 304 U.S. at 78. The principle enunciated is commonly referred to as the Erie doctrine, which refers to case law holding that state law must be applied in federal courts absent some federal law on the issue. For other cases that stand for the primacy of state substantive law in diversity actions and other actions wherein a federal law does not control, see Hanna v. Plumer, 380 U.S. 460 (1965) (holding that Erie established presumption in favor of application of federal law); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (used "outcome determinative test" whereupon state's interest must be balanced against whatever interests federal government might have had in application); Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (state statute of limitations controlled in diversity case for breach of trust to protect noteholders' interest in corporation). It is not surprising then that Erie is implicated as the "very essence of our federalism." Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 695 (1974) (argues that three distinct standards of Constitution, Rules Enabling Act and Rules of Decision Act should not be treated as single command).

In Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), the Court held that a federal court in a diversity case must apply the choice of law rules prevailing in the state wherein the court is located:

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of their neighbors. It is not for the federal courts to thwart such local policies by enforcing an in-
tor has stated, it is imperative that one also realize that national interests are supreme, "which is at least a coequal consideration in analyzing the federal courts' lawmaking power when Congress has acted."10

Federal court judges apply a two step process to determine when to create federal common law.11 First, the court determines whether the issue before it is properly subject to the exercise of federal power.12 Second, the court determines whether public policy dictates that a fed-

dependent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law.

Id. at 496-97. Of critical importance is the rule that if a case is transferred from one federal district to another upon the request of the defendant pursuant to 28 U.S.C. § 1404(a) (1982), the transferee court must apply the law of the transferor court. See Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (change of venue disputed in mass tort action for personal injury and wrongful death). The purpose of this rule is to prevent defendants from defeating the advantages to plaintiffs of a proper forum state law. Id. at 633-34.

10. Vairo, supra note 3, at 177.


12. See Field, supra note 3, at 886. Field states that the "judicial power to act is not limited to particular enclaves . . . it is much broader than the usual references to judicial power would suggest." Id. at 887. She opines that the only limit the judiciary faces in creating common law is "that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule." Id. Since there is no explicit enabling authority for federal common law, a federal court judge would decide the propriety of creating federal common law by interpreting each possible authority to determine if the creation is feasible. Id. at 928. Field adds that "the recitation of an authority interpreted to sustain the federal common lawmaking power takes more seriously the conception that Congress has the last word both on whether the area should be federalized and on what rule should be selected to govern." Id. at 947. Essentially, this means that if Congress were so inclined, it could change the rules with which it does not agree, thus, Congress could modify the federal common law. Id.; see also Illinois v. City of Milwaukee, 406 U.S. 91, 106 (1972); Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369, 392 (1969).
This Comment will begin by examining the authority for the courts' creation of the federal common law. Next the discussion will focus on the possible boundaries of properly enacted federal common law. After examining the limits of federal common law, the Comment will articulate the various advantages and disadvantages of the doctrine. Finally, as an example of the propriety of federal common law, the value of further developing federal common law to encompass mass tort litigation will be examined. This proposal is presented in this Comment to highlight the fact that federal common law is not a dusty or discarded judicial lawmaking tool. To the contrary, the judicial use of federal common law could significantly improve the ability of the legal system to meet society's changing demands. This Comment concludes, therefore, with the suggestion that the legal community apply federal common law in adjudicating mass tort claims.

II. Authority

In examining the propriety of federal common law in our system, it is essential to ascertain upon what authority the federal common law is based. Notably, the grant of federal common law authority is not explicitly established in either the Constitution or federal statutory rules. Consequently, the subject of the authority of the federal common law has generated much discussion.

13. Much scholarly writing is devoted to the analysis of the second prong. See generally Mishkin, supra note 11, at 810-32; Trautman, The Relation Between American Choice of Law and Federal Common Law, 41 LAW & CONTEM. PROBS. 105, 111-14 (1977). For examples of cases which apply federal common law to serve national policy, see infra notes 73-114, 127-97 and accompanying text.

14. For a discussion of the authority for the creation of federal common law, see infra notes 18-61 and accompanying text.

15. Since federal common law enactments have practically no unifying principle, it is crucial to examine the various areas of the law in which federal courts have formulated common law. For a discussion of the situations engendering a need for federal common law, see infra notes 62-152 and accompanying text.

16. Since federal common law is a greatly misunderstood topic, this Comment will examine the advantages and disadvantages of federal common law. See infra notes 153-78 and accompanying text.

17. This Comment concludes by examining an area of the law which is potentially ripe for control by a new federal common law. For a further discussion of the possibilities of federal common law for mass tort litigation, see infra notes 182-281 and accompanying text.


19. See Field, supra note 3, at 899. Field states that this primary limit of requiring authority for federal common law exists for two reasons: one, authority must exist for any exercise of federal power; second, there is no acting authority which gives federal courts power to make common law generally. Id.; see generally Ely, supra note 9; Note, The Federal Common Law, 82 HARV. L. REV. 1512,
that the creation of federal common law requires a broad scope of authority in order for it to meet the demands of the natural evolution of the law. However, to justify the judicial exercise of federal common law, a court must first indicate its source of authority. This Comment will briefly examine several sources which have been recognized as legitimate authority for the creation of federal common law.

A. Constitution

Since all federal law is ultimately attributable to the Constitution, we must look to constitutional law as the basis for federal common law. First, the Constitution states in article III, section 2, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States." Legal scholars have construed the phrase "Laws of the United States" to grant federal courts the power to fashion federal common law. Arguably, jurisdiction to create federal common law is also found in other jurisdictional grants of article III. Commentators also note that if this phrase had not been included in the Constitution, "doubt would be cast on the freedom of federal courts to create it [federal common law]." The necessity of requiring and granting federal courts the power to fashion federal common law

1513 (1969) (logical starting point in determining extent of federal court law-making power is to consult documentary authority, although no statutory or constitutional authority explicitly answers problem).

20. Although this limitation on the creation of federal common law is helpful for analytical purposes, it does not delineate the scope of federal common law, the limitation does not outline what will or will not be deemed to authorize federal common law. See Field, supra note 3, at 928-30, 934-50.

21. See, e.g., Erie, 304 U.S. at 64. The Erie Court clearly rejected the possibility that a court's authority to create federal common law is based on diversity jurisdiction. Id.; see also Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) ("[V]estiging of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."); United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973); Field, supra note 3, at 925 (lawmaking made on basis of such authority "would be unconstitutional, because article III's grant of diversity jurisdiction does not support federal common law").

22. See generally Comment, Federal Common Law and Article III: A Jurisdictional Approach to Erie, 74 YALE L.J. 325, 331 (1964). Cases discussing federal common law could be interpreted as arising under the Constitution, but only in the obscure sense that all federal law is traceable to the Constitution. It has been suggested that such a viewpoint would make the article III reference to laws and treaties superfluous. Id.


24. See Field, supra note 3, at 918 & n.170; Note, supra note 19, at 1513.

25. See Note, supra note 19, at 1513 n.10. Article III also grants jurisdiction for cases arising under the Constitution or treaties of the United States, admiralty and maritime cases in which the United States is a party, and in diversity cases. U.S. CONST. art. III, § 2, cl. 1.


27. See generally Hill, supra note 18, at 1080. Hill notes that where federal
stems from the argument that the United States Supreme Court cannot realistically assume all responsibility for creating federal common law.\textsuperscript{28}

The second constitutional basis for the development of the federal common law lies within the supremacy clause, which acts as a binding force to federal common law enactments.\textsuperscript{29} In \textit{Hinderlider v. La Plata River & Cherry Creek Ditch Co.},\textsuperscript{30} the Court held that federal common law governs the apportionment of water in interstate streams.\textsuperscript{31} In \textit{Hinderlider}, Colorado and New Mexico reached an impasse in determining the most efficient use of the La Plata River.\textsuperscript{32} The Court exercised jurisdiction based on a Supreme Court developed rule requiring equitable apportionment of interstate waters.\textsuperscript{33} One commentator opined that \textit{Hinderlider} stands for the following proposition:

\begin{quote}
[A] right claimed under the "federal common law," in an area of federal preemption established not by Congress but by the Constitution, is a right arising "under the Constitution" within the meaning of the jurisdictional statute, and, by implication, within the meaning of the supremacy clause and the judiciary article.\textsuperscript{34}
\end{quote}

Aside from the above noted provisions, the Constitution does not provide any explicit provision delineating the scope of federal court judges' power in creating federal common law. Addressing this issue, one constitutional scholar has stated that the Constitution exists as a "checklist, enumerating in a general way those things the central gov-

\begin{quote}

courts have jurisdiction, they have the authoritative function to fashion federal law. \textit{Id.} He adds that federal judicial power is similar to state judicial power. \textit{Id.} Hill states "in their respective spheres of competence the courts on the federal and state levels operate within the same judicial function and with the same scope for judicial creativity." \textit{Id.} at 1080-81.

\textsuperscript{28} See Note, \textit{supra} note 19, at 1513.

\textsuperscript{29} See \textit{id.} at 1514; \textit{see also} Friendly, \textit{supra} note 11, at 405, where Judge Friendly states that due to the supremacy clause, federal common law enactment "is binding in every forum."

\textsuperscript{30} In holding that federal law, not state law, recognized the validity of sovereign acts of a foreign power, it is arguable that the \textit{Banco} Court relied on the binding force of the supremacy clause. \textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398 (1964). One commentator noted:

The Court [in \textit{Banco}] did not address itself directly to the question of what it was going to do about nonconforming state cases. . . . But the Court's readiness to pursue a course binding the states to the federal common law is an indicator of its probable behavior when the question is faced.

Note, \textit{supra} note 19, at 1515. For a further discussion of \textit{Banco}, see \textit{infra} notes 144-46 and accompanying text.

\textsuperscript{31} 304 U.S. 92 (1938).

\textsuperscript{32} \textit{Id.} at 110.

\textsuperscript{33} \textit{Id.} at 98.

\textsuperscript{34} Hill, \textit{supra} note 18, at 1076.
government may do and by implication denying it power to do anything else.  

Espousing the theory that the Constitution sets a limit on judicial lawmaking powers, the Erie Court clearly denounced the broad general lawmaking authority of the federal courts that evolved under Swift v. Tyson. The Erie Court noted that the Constitution did not provide the authority that federal court judges exercised in Swift:

Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the courts.

Since the 1930's, the Court has consistently interpreted the Constitution to grant the states lawmaking authority not otherwise entrusted to the central government. Because the Constitution is only a general "checklist," it is arguable that this does not entrust to the central government a general lawmaking authority of the sort the Court had been employing before Erie developed.

B. Statute

The Rules of Decision Act is the controlling statute which determines whether state or federal law should be applied. The Act, in full,

35. Ely, supra note 9, at 701 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819)).
36. Erie, 304 U.S. at 71-78 (1938) (rejecting holding of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), that federal courts in diversity cases do not have to rely on decisional law of state courts).
37. Id. at 78.
38. See Ely, supra note 9, at 702. For examples of state law preemption due to federal statute, see United States v. Oregon, 366 U.S. 643, 649 (1961) (United States rather than state is entitled under federal statute to property of veteran who dies in United States Veterans' Administration Hospital without a will or legal heirs); United States v. Darby, 312 U.S. 100, 114 (1941) (Congress may have policy excluding from interstate commerce goods which do not conform to specified labor standards, and Congress may choose reasonable means to attain permitted policy and even if it controls intrastate activities).
39. See Ely, supra note 9, at 703. As the author noted: The Erie opinion's point was that there was no constitutional basis for the sort of general lawmaking authority exercised under the Swift doctrine; that Congress therefore could not have delegated such authority to the courts; and that the [Rules of Decision] Act consequently should not be construed to have done so.
40. 28 U.S.C. § 1652 (1982). The statute was construed in Erie and Guaranty Trust Co. v. York, 304 U.S. at 71; Guaranty Trust, 326 U.S. 99, 102 (1945). For a review of the significant developments under the Rules of Decision Act from Swift to the present, see C. Wright, THE LAW OF FEDERAL COURTS 347-87 (4th ed. 1983). "No issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of this statute." Id. at 347.
states: "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." The Swift Court interpreted the Rules of Decision Act to require federal courts to apply state statutory law, but not decisional law, except in real estate matters. Under the doctrine of Swift v. Tyson, federal courts in diversity cases were free to construe state laws independently of state court decisions.

Justice Story, in writing for the Swift Court, reasoned that in cases involving "contracts and other instruments of a commercial nature," federal courts were free to follow their own best judgment. The federal courts were free to follow their own judgment because state judicial decisions were not considered by the Court to be part of the "laws of the several states" as that phrase was used in the Rules of Decision Act. The Court concluded that the Act's mandate that state laws be followed "as rules of decision" was not applicable. Thus, the Swift doctrine may also be referred to as a "general law" exception to the Rules of Decision Act.

At the time Swift was decided, "no one suggested that it was an unconstitutional usurpation of power by power-crazed judges." As one commentator has opined, "the central question in Swift v. Tyson involved commercial law rather than federal-state relations." The Swift doctrine of general commercial law was well-received by lower federal courts and state courts.

42. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (holding in federal diversity case that it was not required by Rules of Decision Act to follow state judicial decisions concerning law of negotiable instruments). When Swift was decided, the Act provided: "That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall 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." 1 Stat. 92 (1789). Since its enactment, the Rules of Decision Act has gone through minor changes. The statute is located at 28 U.S.C. § 1652 (1982).
43. 41 U.S. (16 Pet.) 1 (1842).
44. Id. at 18-19.
45. Id. at 19.
46. Id. at 18-19.
47. Id.
49. Id. at 34.
50. Freyer, supra note 5, at 36. This author argues that, despite the appearance of Swift as a case primarily concerned with issues of state sovereignty, practical and legal aspects of the facts and time period of Swift with regard to commercial issues, reveal that these latter considerations weighed heavily in the decision. Id.
51. See Gilmore, supra note 48, at 33-34. Gilmore states, "the doctrine of
The popularity of *Swift* plummeted, however, as the doctrine began to cause disturbing results. For example, parties began to manipulate the *Swift* doctrine for their own advantage in federal diversity jurisdiction.\(^{52}\) In the late 1920’s, the Supreme Court abruptly halted the extension of the *Swift* doctrine.\(^{53}\)

In 1938, the members of the *Swift* Court overruled their interpretation of the Rules of Decision Act in *Erie Railroad v. Tompkins*.\(^{54}\) Justice Brandeis stated:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. **There is no federal general common law.**\(^{55}\)

The *Erie* Court provided insufficient guidelines for courts posed with difficult questions of choice of state or federal law under the Rules of Decision Act.\(^{56}\) In this regard, one commentator added that, despite the unanswered questions concerning choice of law, “[t]he case [*Erie*] put a period, with an exclamation point, to the notion that the decisional rules of the state courts had a status inferior to state statutes in the spheres, whatever they were, in which state law governed.”\(^{57}\)

the general commercial law was warmly welcomed and expansively construed, not only by the lower federal courts but by the state courts as well. For the next half century the Supreme Court of the United States became a great commercial law court.”\(^{id.}\) at 34.

\(^{52}\) See, e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (in diversity case, plaintiff could enforce in Kentucky a contract which under Kentucky state law was void as against public policy). See generally Freyer, supra note 5, at 48-61. One of the more disturbing consequences of *Swift* was the Supreme Court action of displacing state law even when the law was within the “local” matters originally delineated in *Swift*. See id. at 48, 51, 58 & 61. Moreover, *Swift*’s general law exception to the Rules of Decision Act resulted in an increasingly expanding body of federal general common law. See id. at 57, 101-06; see also Shreve, *From Swift to Erie: An Historical Perspective* (Book Review), 82 Mich. L. Rev. 869, 874-75 (1984).

\(^{53}\) See Shreve, supra note 52, at 875. In preparation for overruling *Swift*, Justices Holmes, Brandeis and Stone had the opportunity in *Black & White Taxicab* to add infamous “principled and visionary dissents which were to herald the coming of *Erie*.”\(^{id.}\)

\(^{54}\) 304 U.S. at 77-78 (1938).

\(^{55}\) Id. at 78 (emphasis added). For a discussion of the distinction between the non-existent federal general common law and the existing federal common law, see supra note 5.

\(^{56}\) See Shreve, supra note 52, at 877-78. Shreve noted, “[w]hat does the federal diversity judge do when the meaning of state law is unclear? When state law and a federal rule of civil procedure conflict? When choice-of-law and change-of-venue issues combine?”\(^{id.}\) (footnotes omitted).

It is imperative that the reader note that this does not signal the end of the right of federal court judges to create federal common law. Indeed, federal common law has continued to evolve since the Supreme Court handed down the landmark case, *Erie Railroad v. Tompkins.*\(^{58}\) *Erie* has given new shape to the federal common law by expanding the boundaries for its applications.\(^{59}\) It has been suggested by one commentator that federal courts only need to discover constitutional policies of a valid congressional act in order to discover where the limits lie in creating federal common law for a particular subject.\(^{60}\) Thus, if federal judges couple judicial openness and restraint with a valid constitutional or congressional policy as a guiding authority, federal common law boundaries appear indefinite.\(^{61}\)

### III. Situations Engendering a Need for Federal Common Law

Despite the fact that federal common law has many applications with no unifying principle, there are situations which engender a need for federal common law. Federal common law has been created to fill statutory interstices,\(^{62}\) establish uniformity,\(^{63}\) resolve federal and state conflict\(^{64}\) and to serve overriding federal interests.\(^{65}\) To comprehend

\(^{58}\) 304 U.S. 64.

\(^{59}\) See generally Field, *supra* note 3, at 983. Field adds that “[t]he judiciary is limited only by the tenth amendment, by any express congressional mandates . . . and by its own sense of self-restraint.” *Id.*

\(^{60}\) *Id.* at 982. Field considers possible ways to reduce judicial discretion. *Id.* at 934-46. She suggests that the only plausible alternative is to simply require the judiciary to “specify the authority that it interprets to sustain its announcement of the federal rule.” *Id.* at 947. She adds that a safeguard to this approach exists: “Congress has the last word both on whether the area should be federalized and on what rule should be selected to govern.” *Id.* She notes that requiring the judiciary to find only one authorizing enactment “tells Congress what it must change in order effectively to modify the federal common law rule.” *Id.* at 948.

\(^{61}\) Field concluded:

Surely if litigants understood the discretion in the judiciary and the breadth of its power to make federal common law, or to reshape state law to meet federal needs, most cases would contain an argument, on one issue or another, that following state law on that issue is consistent with federal purposes.

*Id.* at 984.


\(^{63}\) See, *e.g.*, United States v. Yazell, 382 U.S. 341 (1966) (federal common law developed due to federal programs requiring national uniformity).

\(^{64}\) See, *e.g.*, Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) (federal common law needed where state law application would conflict with federal statutory policy).

\(^{65}\) See, *e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (overriding federal interests usually have statutory basis); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal common law created when there is federal interest serviceable).
the possible boundaries of federal common law, it is essential to examine first the areas of law in which it has been properly enacted.

A. Filling Statutory Interstices

In *United States v. Little Lake Misere Land Co.*, the Supreme Court clearly stated that the "inevitable incompleteness presented by all legislation" requires federal courts to fill in the gaps. The Court in *Little Lake* noted that there was no provision in the relevant federal statute guiding a court to choose state or federal law when interpreting federal land acquisition agreements under that statute. The Court explicitly noted that the absence of such a provision was not a "reason for limiting the reach of federal law." The Court concluded that where the land acquisition to which the United States is a party arises from and bears heavily upon a federal regulatory program, the choice-of-law task is one for federal courts. The Court held that to allow state law to abrogate the explicit terms of a prior land acquisition would irreparably impair


67. Id. In *Little Lake*, the United States acquired land parcels in Louisiana for a wildlife refuge pursuant to a federal conservation statute. Id. at 582. The respondents, previous owners of the land, retained mineral rights in the land for ten years, with an extension provision conditional upon certain detailed exploration and production. Id. at 582-83. Thereafter, fee title was to be vested in the United States. Id. at 583. The ten year period expired without the conditions being met. Id. However, the respondents continued to claim such mineral rights by relying on a Louisiana statute, which, in effect, provided that the former owner's mineral rights would extend indefinitely. Id. at 584. At a result, the federal government brought suit to quiet title. Id. at 582.

68. Id. at 593.

69. Id. at 593. Regarding this issue, the Court quoted a scholar on the subject:

At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.

Id. (quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).

70. Id. at 592-93. The Court followed the choice of law task as it had been defined earlier in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), which held that a proprietary right of the United States was a federal right, requiring federal court rule making. 412 U.S. at 592-93. The Court in *Little Lake* noted that dealings that are "ordinary" or "local" between private citizens necessarily raise serious questions of national sovereignty if they arise in the context of specific constitutional or statutory provisions. Id. at 592. This is especially true when the federal government is involved in such transactions. Id. The Court added that in such cases, as in the case at bar, the Constitution or congressional acts "require' otherwise than that state law govern" the situation. Id. at 592-93.
the statutory scheme and all other federal acquisition programs. The Court, therefore, held that state law did not apply, and that the federal law could act to bar state rights.

As another example of gap-filling, courts have applied federal common law when federal statutes so dominate the policy of law that the legal relations they affect must be governed by federal law having sources in those statutes. This was the case in Sola Electric Co. v. Jefferson Electric Co., in which an electrical transformer patent owner sought recovery for unpaid royalties. In Sola Electric, the Court noted the accepted doctrine "that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules." The Court explained that the federal questions of the legal consequences of unlawful acts condemned by federal statutes are to be answered from the statute and the federal policy which it adopted. The Court concluded that conflicting state law and policy must yield to the federal law and policy. It is imperative to note that a factor weighing against the creation of federal common law exists where there is a well-developed body of state

71. Id. at 597-99. The Court explained the purposes behind the conservation statute as reaffirming the importance of contractual certainty in the federal land acquisition program. Id. at 597.

72. Id. at 604. In so holding, the Court explicitly rejected the Fifth Circuit's reasoning in Leiter Minerals, Inc. v. United States, 329 F.2d 85, 90 (5th Cir. 1964), vacated for mootness, 381 U.S. 413 (1965), that in integrating conflicting state and federal laws, a federal court must follow state law in the absence of a federal statute making federal law applicable. Little, 412 U.S. at 585-93.


74. 317 U.S. 173 (1942).

75. Id. The owner of a patent for improvements in an electrical transformer sought recovery from the licensee for unpaid royalties and an injunction restraining further sales except those which conformed to the license agreement. Id. at 74. The licensee argued that the patent was invalid. Id.

76. Id. at 176. The Court said that the Erie doctrine, establishing that state common law must be followed in federal courts, was not applicable where federal statutes completely dominate a policy of law. Id. The Court cited the following cases in support of this rule: Prudence Realization Corp. v. Geist, 316 U.S. 89 (1942) (federal rather than local law applies in interpretation of federal bankruptcy statute in case involving defaulting guarantor's right to share of proceeds); Royal Indemnity Co. v. United States, 313 U.S. 289 (1941) (in absence of controlling statute, federal courts should determine according to own criteria appropriate damage owed to United States for unauthorized release of federal income tax bond); Board of County Commissioners v. United States, 308 U.S. 343 (1939) (despite lack of congressional definition of relief, where right of American Indians to tax exemption is based on treaty, relief to be fashioned is attributable to federal Constitution, treaties and statutes).

77. 317 U.S. at 176.

78. Id. The Court held that, due to an invalid patent, a price fixing license stipulation to manufacture and sell interstate the patented article conflicted with antitrust law. Id. Because local rules of estoppel conflict with antitrust law and policy, the licensee was not estopped to argue invalidity against the licensor in the latter's suit. Id. at 177.
law in an area and an absence of federal law.\textsuperscript{79} For example, in \textit{Wilburn Boat Co. v. Fireman’s Fund Insurance Co.},\textsuperscript{80} the Court declined to establish a federal admiralty rule governing warranties. Instead, the Court remanded the case to the lower courts to follow the appropriate state law.\textsuperscript{81} The Court resisted forming federal common law on the ground that states have routinely and exclusively controlled all types of insurance companies and contracts.\textsuperscript{82} The Court noted that state courts, state legislatures, Congress, insurance companies, and insureds have all treated marine insurance as being controlled exclusively by state law.\textsuperscript{83}

Yet, the existence of detailed federal legislation does not require the creation of interstitial federal common law.\textsuperscript{84} In \textit{Madruga v. Superior Court},\textsuperscript{85} the Court declined to establish federal common law which would control the partition of ships.\textsuperscript{86} Because the establishment of a


\textsuperscript{80} 348 U.S. 310 (1955). Owners of a small houseboat, used for commercial carriage of passengers, sued the insurer to recover loss of the boat after it was destroyed by fire while moored. \textit{Id.} at 311. The insurer refused to pay because the boat was used for commercial purposes without the insurer’s written consent. \textit{Id.} The lower court refused to apply state law, which would have allowed recovery, and held that federal law denying recovery applied. \textit{Id.} at 312. The district court held that since a maritime insurance policy was a maritime contract, federal admiralty law governed. \textit{Id.}

\textsuperscript{81} \textit{Id.} at 314-16, 319-20.

\textsuperscript{82} \textit{Id.} at 316.

\textsuperscript{83} \textit{Id.} at 316-17. It is interesting to note that the Court recognized the difficulties Congress had in attempting to unify insurance law on a nationwide basis. \textit{Id.} at 317-19. It is suggested that here lies the crucial reason for the Court’s refusal to create federal common law. The Court added that if Congress was having such a difficult time in unifying insurance law, the courts would find the task far more difficult. \textit{Id.} at 319. The Court distinguished the approach to unifying insurance law taken by courts, which is on a case-by-case basis, from the congressional procedure of replacing state regulations of marine insurance by one comprehensive act. \textit{Id.} The Court added that by applying its own “piecemeal . . . creeping approach,” it would be leaving marine insurance largely unregulated for many years. \textit{Id.} It is suggested that the key component in the Court’s refusal to fashion federal common law was the difficulty the Court foresaw in the task of fashioning federal common law for such a complex area of the law. \textit{Id.} at 319-21. The Court explained that the major hurdle it would face if it attempted to fashion federal common law for marine insurance was the effect of disturbing the insurance business which had “become one of the great enterprises of the Nation.” \textit{Id.} at 320-21. The Court concluded that it certainly would not attempt to create federal common law in an area where Congress has left such regulation with the states. \textit{Id.} at 321.


\textsuperscript{85} \textit{Id.} The owners of undivided interests totalling 85% in a ship brought suit under state law in a California state court for sale of the ship and partition of the proceeds. \textit{Id.} at 557. The defendant, owner of a 15% interest, challenged the jurisdiction of the California court, arguing that only a federal district court sitting in admiralty could consider such a case. \textit{Id.}

\textsuperscript{86} \textit{Id.} at 561-64. The Court noted that Congress had passed detailed laws
national partition rule was determined not to be of critical importance to the shipping world, the Court declined to fashion federal common law. The Court concluded that "since the absence of such a national rule has produced few difficulties over the years, it appears to us that it would be better to let well enough alone." In *United States v. Brosnan*, the Supreme Court rejected the opportunity to create interstitial federal common law regarding the federal government's rights as a junior lienholder in property after the senior lienholder obtained a judgment on the property in a state proceeding. The Court based its decision not to create a federal common-law rule on two considerations. First, the Court noted that the need for national uniformity in cases wherein the federal government has a junior interest in property did not outweigh the disturbance to local property relationships that would result if the well-established state procedures were re-

regulating the shipping industry as well as rules for ship registration after judicial sales. *Id.* at 561-62. The Court added, however, that Congress has "never seen fit to bar states from making such sales, or to adopt a national partition rule." *Id.* at 562. In a footnote, the Court added that it was significant that partition falls under federal jurisdiction only when the United States is a tenant. *Id.* at 562 n.15.

87. *Id.* at 562. The Court stated it could not foresee that the refusal to create a national partition rule would injure commerce or navigation if states were permitted to continue to follow their own customary partition procedures. *Id.* at 562-63. The Court added that by allowing states to be free to follow their partition procedures, local disputes could be handled by accessible local courts, and state judges could continue to apply the legislative and judicial partition procedures familiar to them. *Id.* at 563. Conversely, the Court noted that if a national rule was to be created, federal courts would be in a quandary as to how to settle the matter since they have rarely been asked to settle such disputes. *Id.* Additionally, the Court stated that there was no reason to believe that a federal law would be simpler to implement or fairer than state law. *Id.* Finally, the Court added that it was not convinced that there were even any theoretical reasons to justify an exclusive national rule. *Id.*

88. *Id.* at 563-64. The Court held that federal court jurisdiction was not exclusive and, thus, the California court was "competent" to have jurisdiction and to render a partition remedy. *Id.* at 560-61.


90. *Id.* This case consolidated two separate proceedings. In Pennsylvania, mortgagees of a tract of Pennsylvania land, on which the United States held a junior federal tax lien, proceeded under a confession-of-judgment provision of the mortgage bond to obtain an in personam judgment against the mortgagor-taxpayer. *Id.* at 239. Thereafter, the United States sued under federal law to enforce its junior tax lien on the same land by foreclosure and sale. *Id.* In California, real estate and personal properties subject to a deed of trust and two chattel mortgages were sold by the trustee-mortgagee pursuant to powers of sale. *Id.* The United States had junior tax liens on the properties, but did not receive actual notice of the sale. *Id.* Subsequently, the mortgagee brought suit under federal law against the United States to quiet title. *Id.* The issue in both cases was whether the federal lien had been effectively extinguished by state proceedings in which the United States was neither a party nor required to be one under state law. *Id.* at 238-39.
placed with federal ones. Secondly, the Court noted the lack of congressional intent to exclude state law application in such a situation.

B. Need for Uniformity

Typically, federal common law is fashioned in accordance with federal programs and actions which by their nature must be uniform throughout the nation. In United States v. Yazell, the United States instituted an action to collect against a wife's separate property after a couple defaulted on their Small Business Administration Loan. The Court declined to create federal law in a situation wherein there was no federal interest to override local law, and thereby precluded the federal government from collecting in supervision of the state law of coverture. The Court stated that state interests should only be overridden by federal courts when it is clear that substantial interests of the national government would be seriously damaged if inconsistent state laws were applied. The Court distinguished Clearfield Trust Co. v. United States.

91. Id. at 242. The Court stated that it would not interject a new federal rule because "it would be more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area" to continue to apply well-established state procedures. Id. For a discussion of the creation of federal common law based on the need for national uniformity, see infra notes 93-114 and accompanying text. For a further discussion of Brosnan, see infra notes 125-26 and accompanying text.

92. Brosnan, 363 U.S. at 250. The Government argued that such congressional intentions were set forth in certain statutes. Id. at 242. The Court rejected the argument on the ground that the statutes on their face evidenced no congressional intent to exclude available state procedures. Id. at 242-50. The Court cautioned, however, that the decision to allow state law application "would not withstand a congressional direction to the contrary." Id. at 242.


94. Id. Yazell and his wife negotiated a disaster loan, secured by a chattel mortgage, with the Small Business Administration after the Yazells' shop had been damaged by a flood in Texas. Id. at 344-45. The Yazells later defaulted on the note, the lender foreclosed on the mortgage, and the United States brought this suit against Mrs. Yazell's separate property for the deficiency. Id. at 348.

95. Id. at 345-58. The Court stated that in the absence of a specific provision in the federal statute or regulation or in the contract itself, the federal interest in the collection of an amount due on a contract individually negotiated by a federal agency does not justify displacing state law in the local field of family and family property rights and immunities. Id. at 348-49. The Court recognized the government's concern with uniformity of federal lien priority and was careful to note that the specific facts of the case were "intensely material to the resolution" of the case. Id. at 343, 346.

96. Id. at 352. The Court noted that since each state regulated family and family property arrangements, there must be a reason to subordinate the arrangements to federal interests. Id. In this case, there was no reason offered to breach such arrangements. Id. The court did not deny its authority to override state law, but stated that, in light of the Court's "solicitude" for state family law, it "should not" so override law in the absence of congressional or appropriate administrative action. Id.
which permitted federal law to supersede state law because it involved
an area of the law, commercial paper, which by its nature required na-
tional uniformity. The Yazell Court compared its fact situation to cases
dealing with homestead exemptions. The Court made that compari-
sion because homestead exemptions, like the coverture which was a limi-
tation based on a similar purpose and theory, limit the power of the
federal government to collect.

The need for uniformity is the most frequently noted reason for
fashioning federal common law. In United States v. Standard Oil Co.,
the United States sought to recover expenses it paid for a soldier’s inju-
ries caused by a negligent non-governmental motor driver. The

97. 318 U.S. 363 (1943).
98. Yazell, 382 U.S. at 354. The Court in Yazell cited other areas of federal
law which, due to their special nature, required uniform application regardless
of state law. These included the liability of the federal government for local
taxes on government owned property and the rights of the FDIC as insurer-
assignee of banks against bank creditors. Id.
99. Id. at 354-56.
100. Id. at 355. The Court discussed Fink v. O’Neil, 106 U.S. 272 (1882),
where the United States attempted to levy execution against property which was
exempt from execution under state law. The Fink Court held that the United
States’ remedies on judgments were limited to state law provisions. Fink, 106
U.S. at 284-85; see Yazell, 382 U.S. at 355.
(Court ordered district court to fashion federal common law consistent with poli-
cies of federal environmental laws regarding claim for nuisance for interstate
water pollution); Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.,
394 U.S. 369, 380-82 (1969) (state court in railroad labor dispute must apply
federal law since application of divergent state laws would undermine uniformity
required by federal labor law); International Ass’n of Machinists v. Central Air-
lines, Inc., 372 U.S. 682, 691-92 (1963) (validity of agreement between airline
and union is matter of federal law where uniformity of application is required to
fulfill federal act and its purpose); Local 174, Int’l Bhd. of Teamsters v. Lucas
Flour Co., 369 U.S. 95, 102-04 (1962) (to achieve uniformity, “incompatible
doctrines of local law must give way to principles of federal labor law” in case
involving dismissal and strike terms of labor agreement); Dice v. Akron, Canton
& Youngstown R.R., 342 U.S. 359, 361 (1952) (liability under federal statute of
railroad for employee’s injuries is matter of federal law, to provide “uniform
application . . . essential to effectuate its purposes.”); United States v. Standard
Oil Co., 332 U.S. 301, 305-10 (1947) (right of government to recover from tortfeaso
for disability payments to soldier is matter of federal law and requires
uniform national policy); Brady v. Southern Ry., 320 U.S. 476, 479 (1943)
(amount of evidence required to prove liability for railroad’s negligence under
federal statute must be set as uniform rule under federal law); Clearfield Trust
Co. v. United States, 318 U.S. 363, 367 (1943) (application of state law to deter-
mine rights of parties following forgery of Federal Reserve check would be inap-
propriate due to necessity of uniform rule); Garrett v. Moore-McCormack Co.,
317 U.S. 239, 244 (1942) (to achieve uniformity of application, federal rather
than state burden of proof applies in case involving recovery of injured seaman
under federal statute).
102. 332 U.S. 301 (1947).
103. Id. at 302. In Standard Oil, a soldier in the United States Army was
injured by the negligence of the driver of a motor truck. Id. The United States
Court held that the issue before it was made exclusively federal by constitutional and congressional command requiring a national uniform disposition and not diversified state rulings. The Court noted that in determining whether federal courts may create federal common law when Erie does not apply, several factors are considered: (1) the government's legal interests and relations, (2) federal supremacy, (3) the need for uniformity, and (4) whether Congress has recognized but not altered established methods of handling the issue. The Court emphasized that there are instances in which the creation of federal common law is appropriate. However, the Court did not establish any boundaries for its creation.

Conversely, the absence of a need for uniformity is cited as a ground for not fashioning federal common law. For example, in International Union, Automobile, Aerospace & Agricultural Implement Workers v. Hoosier Cardinal Corp., a labor union brought suit against its employer for the recovery of vacation pay owed to the discharged union

bore the cost of the soldier's medical expenses and later attempted to recover those expenses from the employer of the driver. Id.

104. Id. at 307. The Court added that there was no purpose for broadening state powers over matters of an essentially federal character. Id. The Court further added that the federal judiciary had the power to create federal common law for essentially federal matters, "even though Congress has not acted affirmatively about the specific question." Id.

105. Id. at 309-10. The Court explicitly declined to limit or categorize instances where state law may be applied outside the control of Erie, such as where application of local law is fair and convenient, and where it does not result in diversified results where uniformity is essential. Id. at 309.

106. Id. at 308-10.

107. For a further discussion of the Court's prediction of future federal common law instances, see supra text accompanying note 104. It is submitted that the absence of drawing clear boundaries is critical to the continued evolution of the federal common law. The Supreme Court purposely left the door open to the creation of all types of federal common law because it recognized that through the act of making federal common law, necessary and essential areas of the law could be developed for the benefit of society's needs.


employees. The Court recognized that the suit was appropriately brought under a federal labor statute. However, the Court declined to devise a uniform statute of limitations to close the statutory gap left open by Congress. The Court acknowledged that the "need for uniformity" factor is a strong justification for the creation of federal common law, but it added that there was no justification in the case at bar for such a statutory addition. The Court explained that the need for uniformity is greatest:

[W]here its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. . . . Statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

Although Congress has in the past created time limitations after an act was enacted, the Court stated it could not infer that when Congress enacted the legislation in question without a time limitation, Congress’

110. Id. Union and employer were parties to a collective bargaining agreement that required payment of accumulated vacation pay to qualified employees upon termination of employment. Id. at 698. In June 1957, the company discharged employees who were covered by the agreement without the aforementioned payment. Id. A suit was brought in state court to recover such amounts, but the suit was dismissed due to an insufficiency under state law. Id. at 698-99. Four years later, seven years after the employees left their jobs, the suit was brought in a federal district court under a federal labor statute which did not provide a uniform statute of limitations provision. Id. at 699. The district court applied Indiana’s six year statute of limitations governing contracts not in writing. Id. Thereafter, the court dismissed the case as untimely. Id. The court of appeals affirmed. Id.

111. Id. at 699. The relevant statute was designed to permit suits for "violation of contracts between an employer and a labor organization." Id. The Court added that the union had standing to vindicate employee rights under the collective bargaining agreement. Id. at 700. The Court noted that the union’s standing "implies . . . the established doctrine that the union’s role in the collective bargaining process does not end with the making of the contract." Id. (citing Conley v. Gibson, 355 U.S. 41, 46 (1957); Comment, The Emergent Federal Common Law of Labor Contracts: A Survey of the Law under Section 301, 28 U. CHI. L. REV. 707, 716 (1961)).

112. International Union, 383 U.S. at 701. The Court added that the "teaching of our cases does not require so bald a form of judicial innovation." Id. The Court recognized that although certain federal labor problems "command" a high amount of creativity on the part of the courts to implement labor policy, the situation in the case at bar was not such an instance. Id.

113. Id. at 702-03 (citing Smith v. Evening News Ass’n, 371 U.S. 195, 203 (1962) (Justice Black noted in his dissenting opinion that the Court should wait for Congress to add “drastic changes” to national labor law)).

114. Id. at 702.
purpose was to have courts invent a limitation.\textsuperscript{115}

**C. Resolving Federal/State Conflict**

Federal common law is often created when the application of state law would conflict with federal policy, notably with a policy rooted in a federal statute. In \textit{Wallis v. Pan American Petroleum Corp.},\textsuperscript{116} parties were involved in a dispute regarding the validity of certain mineral leases to exploit oil and gas deposits.\textsuperscript{117} The Court expressly recognized that where a significant conflict exists between a federal interest and the use of a state law, the fashioning of federal common law is appropriate.\textsuperscript{118} The Court held that state law did not conflict with federal interests, thus, state law was permitted to govern the controversy.\textsuperscript{119}

Courts create federal common law when the application of state law would frustrate the effective implementation of federal statutes. In \textit{Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.},\textsuperscript{120} the Court was asked to determine whether a state court could apply state law to enjoin picketing not expressly proscribed by federal railroad or labor

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 703. The Court noted that Congress, after much controversy, enacted a six months' provision to govern unfair labor practice proceedings. \textit{Id}. For a further discussion of this congressional enactment, see \textit{id}. at n.5.
\item \textsuperscript{116} 384 U.S. 63 (1966).
\item \textsuperscript{117} \textit{Id.} Wallis filed with the Secretary of the Interior under a federal statute governing lands acquired by the United States for a lease to exploit oil and gas deposits in several federal tracts in Louisiana. \textit{Id}. at 65. Wallis agreed to give McKenna a one-third interest in the applications and any lease issued, and later sold Pan American Petroleum Corporation an option to acquire any lease that he might obtain under the applications. \textit{Id}. Concerned that the tracts might be governed by a different federal statute, one concerned with public domain lands, Wallis filed new applications for the same tracts under that statute. \textit{Id}. After the tracts in question were ruled to be public domain land, Pan American and McKenna brought suit, each urging that the agreement they had made with Wallis be enforced. \textit{Id}. at 65-66. The federal district court held for Wallis on the basis that under Louisiana law, a mineral lease agreement could be effective solely under written agreement, and since the written agreements here only covered leases under the statute governing acquired lands, that agreement could not be applied to public domain lands. \textit{Id}. at 66. The court of appeals reversed on the basis that federal law, not state law, governed the claim to leases on public domain land. \textit{Id}.
\item \textsuperscript{118} \textit{Id.} at 68. The Court implied that the showing of a significant conflict between federal policy and state law is a difficult burden, noting that normally the decision to displace state law by use of federal power is one for Congress. \textit{Id}. When state law does not conflict with federal policy as found in federal statutes, state law should govern. \textit{Id}.
\item \textsuperscript{119} \textit{Id.} at 69-71. The Court examined the federal statute in question to divine its underlying policy and determined that the statute did not attempt to regulate the rights inter se of private parties in dealings related to the leases governed by the statute. \textit{Id}. at 69. The Court found no threat to federal policy since Louisiana state law was not inconsistent with any of the statute's provisions or policies, and thereby, concluded that state law adequately protected federal interests. \textit{Id}. at 70-71.
\item \textsuperscript{120} 394 U.S. 369 (1969).
\end{itemize}
The Court declined to delineate which types of picketing were federally protected and which were subject to state prohibition. Rather, the Court held that until Congress addressed the picketing in question, states would not be permitted to prohibit picketing not clearly within the ambit of federal law. The Court based its determination on the fact that, although both labor and the railroads are areas subject to detailed federal regulation, neither of these bodies of federal statutory law provided an answer to the particular picketing problem at hand. Therefore, while the Court did not rule on the propriety of the picketing, it did protect the dispute from state regulation.

Notably, a factor weighing against the creation of federal common law is if the federal common law would have an undesirable impact on state law. In *United States v. Brosnan*, the Court examined two cases in which the issue was whether a federal lien was effectively extinguished by state proceedings to which the United States was neither a party nor required to be one under state law. The Court held that the creation of federal common law is not appropriate when the need for it is outweighed by the substantial dislocation to local property relationships which would result from disregarding state law.

---

121. *Id.* After an extremely long and exhaustive labor dispute, a railroad unilaterally changed pay and work conditions for its employees. *Id.* at 371. The employees' union called a strike and picketed various places of the railroad's operations, including that of the plaintiff's. *Id.* The plaintiff sued in federal court and obtained an injunction, which was reversed on the grounds that federal labor law prevented the injunction. *Id.* at 372. The Supreme Court in a previous opinion affirmed the appellate court. *Id.* The plaintiff did obtain an injunction, however, in a parallel state proceeding. *Id.* The Court was, therefore, faced with the issue of "the extent of state power to regulate the economic combat of parties subject to" federal labor statute. *Id.*

122. *Id.* at 392-93. The Court, following a detailed discussion of the rules and policies embodied in federal labor and railroad statutes, concluded that while some forms of self-help by railroad employees was federally protected, the secondary picketing used in the case at hand was neither clearly protected nor prohibited. *Id.* at 390. However, the Court held that it could not permit states to regulate where Congress had not, since in doing so the Court would be making a decision properly left to Congress. *Id.* at 391.

123. *Id.* at 390. The Court declined to make a judicial decision defining what types of picketing were federally protected. *Id.* at 391. Because it sensed a lack of clear congressional policy on the issue, and due to the complexity of the interplay between federal labor and railroad law, the Court deemed itself incompetent to draw lines. *Id.* at 391-92.

124. *Id.* at 392-93. Thus, the Court reversed the state injunction, holding that the state was without authority to rule on the picketing issue. *Id.* at 393.


126. *Id.* at 238-40. For a further discussion of *Brosnan*, see *supra* notes 88-91 and accompanying text.

127. *Brosnan*, 363 U.S. at 242. For a further discussion of the Court's rationale to utilize state rather than federal law, see *supra* note 90.
D. Serving Overriding Federal Interests

Federal common law is created when there is an overriding federal interest to be served. In Illinois v. City of Milwaukee, the Supreme Court held that federal common law governed public nuisance created by interstate water pollution, until Congress passed new federal regulations preempting the federal common law field of nuisance. The Court quoted a federal appeals court which explained that unlike varying states' common law, federal common law could uniformly handle the impairment of a state's environmental rights caused by sources outside the state.

Additionally, federal common law is fashioned when overriding federal interests have a statutory basis. In Textile Workers Union v. Lincoln Mills, a labor union sued to compel its employer to comply with mandatory arbitration procedures. The Court held that federal law is the substantive law to be applied in an action brought under a federal labor statute regulating enforcement of collective bargaining agreements. The Court pointed out that the range of judicial creativity is


129. 406 U.S. 91 (1972). The State of Illinois brought suit against the City of Milwaukee and several other Wisconsin cities. The State of Illinois stated that 200 million gallons of sewage and other waste materials were being discharged daily into Lake Michigan in the Milwaukee vicinity. Id. Illinois sought an abatement of the pollution as "a public nuisance." Id. The Supreme Court held that the federal common law of nuisance governed, but declined original jurisdiction and remanded the case to the federal district court. Id. at 108. For a discussion of the subsequent litigation in this case, see Illinois v. City of Milwaukee, 731 F.2d 403, 404-05 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985).


131. Milwaukee, 406 U.S. at 107 n.9 (quoting Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir. 1971)). The Court, in Milwaukee, noted, however, that state standards may be relevant to a court developing federal common law. Id. at 107.


133. Id. A collective bargaining agreement provided that there would be no strikes or work stoppages, and that grievances would be handled through a specified procedure, the last step of which was arbitration. Id. at 449. Grievances arose and the union utilized all steps in the procedure. Id. The union requested arbitration, which the employer refused, and the union sued to compel arbitration. Id. While the district court ordered compliance, the appellate court held that the district court had no authority under federal or state law to grant such relief. Id.

134. Id. at 456. The Court came to this conclusion following a discussion of the scope of federal judicial authority under the statute to fashion federal substantive law in light of an unclear directive from the words of the statute. Id. at 449-56. The Court further stated that such substantive law will be fashioned from the policy of the national labor laws. Id. at 456 (noting Mendelsohn, En-
determined by the nature of the situation.\textsuperscript{135} State law can be examined to find the best rule to effectuate the federal policy \textit{if the state law is compatible with the purpose of the Act}.\textsuperscript{136} It is submitted that the ease of applying the rule depends upon the extent to which Congress has clearly indicated the Act’s purpose and standards.\textsuperscript{137} This was the case in \textit{Brotherhood of Railroad Trainmen v. Jacksonvile Terminal Co.},\textsuperscript{138} wherein the Court refused to create federal common law due to an absence of specific statutory standards and lack of access to administrative expertise.\textsuperscript{139}

Federal common law may also be created when the federal government has proprietary interests.\textsuperscript{140} For example, in \textit{United States v. 93.970 Acres of Land}, 360 U.S. 328, 332-33 (1959) (for a discussion of the facts and holding in this case, see infra notes 140-42 and accompanying text); \textit{Clearfield Trust Co. v. United States}, 318 U.S. 363, 366-67 (1943) (federal law applies to determine rights of United States in converted Federal Reserve check issued pursuant to federal statute where to apply state law would subject United States to uncertainty as to its rights and duties); \textit{United States v. Miller}, 317 U.S. 394, 379-80 (1943) (federal law controls compensation value of property taken by eminent domain by United States); \textit{Kohl v. United States}, 91 U.S. 367, 374-75 (1876) (implicit in federal condemnation statute is right of Secretary of Treasury to invoke and of federal courts to order condemnation). \textit{But see Bank of Am. Nat’l Trust & Sav. Ass’n v. Parnell}, 352 U.S. 29, 33-34 (1956) (distinguishing \textit{Clearfield,
Acres of Land, the Court held that since the federal government's essential interests were involved in its leasing a naval airfield to a private operator, federal law should govern the government's rights under the lease. The Court briefly explained that since condemnation is an essential government function under which immediate possession by the government is warranted, federal law must govern. Finally, federal common law may be created when there is an overriding federal interest in foreign affairs. In Banco Nacional de Cuba v. Sabbatino, a foreign instrumentality initiated suit for conversion of bills of lading. The Court determined that an issue concerning the compe-

141. 360 U.S. 328 (1959). The Secretary of the Navy leased naval lands under a revocable lease to a private operator. Id. at 329. The lease was authorized by a federal statute which also provided for revocability. Id. at 331. The lease's preambles stated that the government considered it essential to retain the field in a stand-by basis for "use in connection with Naval Aviation activities." Id. at 329. A further provision of the lease stated that the lease "will at all times be revocable at will by the Government" upon giving certain notice. Id. The Army later needed the land, and the Secretaries of the Army and Navy served notice of revocation of the lease. Id. at 330. The lessee declined to leave the land on the basis that the lease could only be revoked for "Naval Aviation activities." Id. The Government sued to condemn the lessee's possessory interest in the land. Id.

142. Id. at 332-33. The Court found that revocation of the lease was not limited to revocation for aviation purposes, thus concluding that the revocation was valid and effective. Id. at 331-32.

143. Id. at 332-33. The Court refused to accept the lessee's argument that the government must follow the doctrine of election of remedies. Id. at 332. Under the doctrine, the government would be forced to choose either to abandon its power to revoke the lease or to give up its right to immediate possession under condemnation law. Id. The Court rejected this argument as unreasonable and unjust. Id. The Court stated that "[s]uch a strict rule against combining different causes of action would certainly be out of harmony with modern legislation and rules designed to make trials as efficient, expeditious and inexpensive as fairness will permit." Id.


145. Id. Respondent, an American commodity broker, contracted with a Cuban corporation (largely owned by United States residents) to buy Cuban sugar. Id. at 401. After the United States government reduced the Cuban sugar quota, the Cuban government expropriated the corporation's property and rights. Id. at 401-03. In order to secure consent of the Cuban government for the shipment of the sugar, the broker made a new contract, agreeing to make payment for the sugar to a Cuban instrumentality. Id. at 404-05. The Cuban instrumentality assigned the bills of lading to the petitioner, another Cuban instrumentality, which instructed its agent in New York to deliver to the respondent-broker the bills of lading and sight draft in return for payment. Id. at 405. The broker accepted the document and received payment but, based on an agreement with the American owned Cuban corporation, refused to deliver the proceeds to the petitioner's agent. Id. at 405-06. Petitioner brought this action for conversion of the bills of lading to recover payment from the broker. Id. at 406.
tence and function of the judicial and executive branches in shaping foreign policy with members of the international community must be exclusively governed by federal law.\textsuperscript{146} The Court cited Philip C. Jessup, an eminent scholar and judge of the International Court of Justice, who warned against applying \textit{Erie} to international legal relations, cautioning that such an application would result in divergent and "perhaps parochial state interpretations" of international rules of law.\textsuperscript{147}

E. Summary

The judicial approach to creating federal common law is one involving discretion and restraint.\textsuperscript{148} Judicial discretion is arguably the only limit on the creation of federal common law,\textsuperscript{149} although judicial discretion involves a presumption favoring the use of state law.\textsuperscript{150} Once a court determines it can make federal common law, the court may choose to use state rules "rather than create a federal one, because those state rules adequately serve federal purposes."\textsuperscript{151}

As Professor Field has noted, the factors involved in choosing between state and federal law were summed up by Justice Harlan in \textit{Wallis v. Pan American Petroleum Corp.}\textsuperscript{152} Professor Field succinctly condensed Justice Harlan’s statement on the rules for choosing between state and federal law: "federal rules will be made when there is a need for na-

\textsuperscript{146}. \textit{Id.} at 425.
\textsuperscript{147}. \textit{Id.} The Court here referred to Jessup, \textit{The Doctrine of Erie Railroad v. Tompkins Applied to International Law}, 33 AM. J. INT’L L. 740 (1939). Jessup suggested that federal courts could assert “that since the foreign relations of the United States are entrusted to the Federal Government, no state of the Union has the power to take to itself an area which the Federal Government considers to be high seas, since such a taking would involve disputes with foreign governments.” \textit{Id.} at 742-43. Jessup added that federal courts applying international law need not justify their actions by stating that international law is part of the common law. \textit{Id.} at 743. Jessup concluded by noting that the duty of federal courts to apply international law is “imposed upon the United States as an international person.” \textit{Id.}
\textsuperscript{148}. \textit{See Field, supra} note 3, at 950.
\textsuperscript{149}. \textit{Id.}
\textsuperscript{150}. \textit{Id.}
\textsuperscript{151}. \textit{Id.} at 950 & n.295.
\textsuperscript{152}. \textit{Id.} at 961-62 (citing \textit{Wallis v. Pan American Petroleum Corp.}, 384 U.S. 63 (1966)). Justice Harlan noted in \textit{Wallis v. Pan American Petroleum Corp.} that there are two steps a judge should use in determining whether to displace state law with federal. 384 U.S. 63, 68 (1966). First, the judge must decide whether state law poses any "significant threat to any identifiable federal policy or interest." \textit{Id.} Second, if this question is answered in the affirmative, the court should then "consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern, . . . the feasibility of creating a judicial substitute, . . . and other similar factors.” \textit{Id.} at 68-69 (citations omitted). This portion of Justice Harlan’s opinion is discussed in Field, \textit{supra} note 3, at 961-62. For a discussion of the factors involved in the decision to create federal common law, see \textit{supra} notes 67-146 and accompanying text.
tional uniformity that outweighs the need for uniformity within a state; or when national interests require. But state law should apply whenever that result is not inconsistent with federal purposes.153

In spite of the numerous Supreme Court decisions that have discussed and sometimes created federal common law, many in the legal profession have expressed their concerns over the status of the federal common law. The next section will examine both the criticisms and praises of courts which create federal common law.

IV. ADVANTAGES AND DISADVANTAGES OF FEDERAL COMMON LAW

A. Advantages

1. Separation of Powers

Probably one of the greatest fears caused by the power of federal judges to create federal common law is that judges will fill any and all gaps in federal or constitutional directives regardless of congressional intent: thereby, reducing the role of state law in violation of the tenets of federalism and separation of powers.154 Professor Field suggests that the balanced approach utilized by federal courts under the modern system does not raise separation of powers concerns. Additionally, she discusses an alternative system wherein courts create federal common law only in response to explicit legislative directive. However, although this approach would decrease the risk of federal judges encroaching on state authority, it would cause "separation of power problems of its own," Field argues, by curtailing "essential judicial functions."155 On the other hand, a rule allowing the federal courts the same authority as Congress for rulemaking would violate the Erie doctrine.156 Therefore, the implication is that the current approach, which requires a source of authority for the formation of federal common law, is appropriate and helps maintain the requisite constitutional balance.157

2. Judicial Insight

Much has been said about the congressional prowess in performing the lawmaking function.158 However, one problem with Congress is its inability to understand how a particular legislative scheme affects litig-

153. Field, supra note 3, at 962.
154. Id. at 931. For a more detailed discussion of the particular separation of powers problem suggested by a broad rule of federal common-law rulemaking, see id. at 931-34.
155. Id. at 934.
156. Id. at 929.
157. Id. at 927-34.
158. Id. at 933. Field discusses the relative advantages of lawmaking by the judicial and legislative branches. Id. She argues that the superiority of Congress to make law flows from the institutional differences between it and the courts, such as Congress' investigating resources and ability for completeness which make it better equipped to engage in systematic legal change. Id.
In these instances, the judiciary can provide exemplary solutions. This is mainly due to its uncanny sense of “hindsight” in understanding the potential problems of congressional plans. Furthermore, since courts are absent from the political process, a sense of equity and reasonableness is bestowed upon judicial decisions.

It has been suggested that a possible system for lawmaking is for lawmaking authority to reside solely in the hands of the legislative branch. It is submitted that that would be an intolerable and unnecessary impediment to the creative and essential judiciary functions.

Indeed, if lawmaking acts resided only in the legislative branch, the natural progression of law would be dismantled.

It is submitted that it is unreasonable to insist that Congress foresee all issues that will be litigated with regard to a legislative scheme. Undoubtedly, particular issues can be handled more efficiently and correctly through judicial action. As Professor Field argues, “[c]ase-by-case development is sometimes the wisest choice; sometimes situations emerge that no one could foresee at the time of the legislation.” Thus, it is submitted that the only logical basis upon which federal common law may be created is “generalized, and not specific, congressional (or constitutional) intent concerning whether the judiciary should fill in gaps with federal law, or instead let state law, or no law, operate.”

Judge Friendly has presented perhaps the best argument in support of federal common lawmaking:

One of the beauties of the [mandate to fashion federal common law consistent with federal legislation] for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to the federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic lawmaking function with Congress always able to set matters right if they go

159. Id. at 934.
160. Id.
161. Id.
162. Id. Field discusses a system wherein the judiciary has no authority for rulemaking, but promptly rejects the plan as “unworkable.” Id.
163. Id. Field argues that the need for judicial supplementation of congressional action would lead to the formation of federal common law despite a directive against it, and that such judicial action would simply be labeled “interpretation” rather than “federal common law.” Id. at 940-41.
164. Id. at 934.
165. Id. at 944. Field rejects a standard which would enable federal judges to create common law only if they had a specific directive or intent from Congress. Id. In effect, this standard would prevent courts “from taking the initiative in determining that a particular area should be federal.” Id.
166. Id. For a further discussion of Professor Field’s thesis, see id. at 906-50.
Judge Friendly poses two arguments favoring federal court lawmaking. First, he argues that it promotes judicial creativity. Second, he argues that it would ensure eternal legislative supervision of judicial enactments.

B. Disadvantages

Naturally, objections to federal common lawmaking have also been well-argued. This section will examine such arguments.

1. Fear of Judicial Usurpation

As indicated, daily use of the judiciary to create law can be regarded as unsettling. First, it may be viewed as a usurpation of state interests because a “non-democratically selected” judiciary would be making more public policy than the states could tolerate. The effect of non-judiciary intervention together with the absence of a congressional enactment means a free reign over state law. Thus, federal judicial lawmaking may be observed as curtailing state lawmaking.

Second, it has been argued that the federal judiciary’s exercise of lawmaking curtails congressional lawmaking. However, it should be noted that Congress has the ability to change federal common law through subsequent congressional enactments on the same subject of law, thereby preempting federal common law. The legislative ability


168. Id.

169. Under the current analysis of the proper relative powers of state and federal legislatures and courts, federal courts are not free to impinge on the authority of state lawmakers, resulting in the rule that a federal court has no authority to act without some form of congressional or statutory authorization. See Field, supra note 3, at 931-33; Trautman, supra note 13, at 112 (federal law builds on the primary law generated by the states); cf. Bank of Am. Nat’l Trust & Sav. Ass’n v. Parnell, 352 U.S. 29 (1956) (where possibility is remote that rights and duties of United States in its commercial paper might be adversely affected by state rule, state law controls burden of proving good faith in fraud allegations). For a discussion of the separation of powers issue involved in federal common lawmaking, see supra notes 153-56 and accompanying text.

170. See Field, supra note 3, at 938.

171. See id. at 925-26.

172. See id. at 924-25. However, when an area of law is governed by federal legislation, the judiciary is precluded from creating federal common law. See id.

173. See id. at 925. However, when an area of law is governed by federal legislation, the judiciary is precluded from creating federal common law. See id.

174. See id. Professor Field suggests that federal common law "cuts down on congressional power only if a congressional failure to act represents a congressional judgment that no federal lawmaking should exist." Id. She adds that this type of judicial usurpation is less compromising than when state authority is affected, since Congress always has the authority to alter a judicial rule. Id. at 924-25. For a more thorough discussion of the relationship between federal
to preempt federal common law serves to alleviate much of the apprehension surrounding the view that judicial lawmaking will curtail congressional lawmaking. 175

2. The Unsurefootedness of Erie

One of the primary disadvantages of the Erie decision itself is its lack of clarity and direction in how and when to formulate federal common law. 176 To determine the propriety of fashioning federal common law in a particular situation by relying on Erie is a nearly impossible task. 177 However, the Erie doctrine has matured well past the original decision, and, as the previous discussion suggests, there now exist guidelines for when federal common law may be created. 178

V. A Potential Area of Federal Common Law

As mentioned previously, federal common law has been created to fill statutory interstices, 179 establish uniformity, 180 resolve federal/state conflict, 181 and serve overriding federal interests. 182 The propriety of the federal common law exists to reshape state laws to meet federal needs and to acknowledge the superiority of national interests. It is only befitting that we try to explain and understand federal common law by
courts and Congress, see Vairo, supra note 3, at 189 n.136, and supra notes 67-146 and accompanying text.

175. See Field, supra note 3, at 925.

176. Erie, 304 U.S. at 64. Professor Field suggests that the constitutional basis of Erie is unclear from the decision. See Field, supra note 3, at 924. She argues that while Erie offers "some support for the view that courts can make federal rules up to the limit of congressional power, it by no means unambiguously supports that position." Id.

177. See Shreve, supra note 52, at 877. "It is certainly true that in hard cases today under the Rules of Decision Act, Erie, alone, is of little help." Id.

178. See Friendly, supra note 11, at 421 (following an analysis of cases which followed and built on Erie, Judge Friendly concluded: "[T]he Supreme Court . . . has been forging a new centripetal tool incalculably useful to our federal system."). Professor Field, while she criticizes the "absence of an articulated standard" for "exacerbat[ing] the inconsistency and unpredictability" with which federal common law is applied, suggests that the post-Erie cases can be interpreted into a general concept which is constitutionally consistent. See Field, supra note 3, at 927-28.

179. For an examination of the case law discussing the creation of federal common law to fill statutory interstices, see supra notes 67-92 and accompanying text.

180. For an examination of the case law which fashioned federal common law to areas of the law requiring national uniformity, see supra notes 93-114 and accompanying text.

181. For an overview of federal common law enactments created where state and federal law conflict, see supra notes 116-26 and accompanying text.

182. For an analysis of federal common law created where there is an overriding federal interest, see supra notes 127-46 and accompanying text.
examining an area of the law that may be ripe for the creation of federal 
common lawmaking.

A. Mass Tort Litigation

Recently, federal district courts have been debating whether to fash-
ion federal common law for a rapidly developing area of the law—mass 
tort litigation for hazardous substances. Federal courts have recog-
nized the crisis brewing in such mass tort litigations as asbestos expo-
sure claims because the magnitude of claims alone is unlike any other 
tort litigation yet analyzed. No expert is able to accurately estimate 
the number of asbestos claims that ultimately will be filed.

Two crucial issues will face unfortunate future asbestos plaintiffs:

183. Examples of products involved in mass tort litigation include “agent 
orange,” asbestos, diethylstilbestrol (“DES”), the Dalkon Shield and toxic 
wastes. See, e.g., In re “Agent Orange” Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 
States, 592 F.2d 712 (3d Cir. 1979) (radiation exposure), cert. denied, 441 U.S. 
961 (1979); In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983) 
asbestos exposure); In re Northern Dist. “Dalkon Shield” IUD Prods. Liab. Li-
tig., 526 F. Supp. 887 (N.D. Cal. 1981) (intrauterine device), vacated and re-
manded, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); In re 
defective vaccine); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 
1978) (DES drug); see also COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, 
97TH CONG., 2D SESS., REPORT ON INJURIES AND DAMAGES FROM HAZARDOUS 
WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES (Comm. Print 1982).

For a distinction between mass tort cases involving mass tort actions for 
accidents occurring in one jurisdiction and mass tort actions for injuries from 
exposure to hazardous products, see Vairo, supra note 3, at 167 n.1. See also 
Northern Dist., Dalkon Shield 1.U.D. Prods. Liab. Litig., 693 F.2d 847, 852-54 
(9th Cir. 1982) (distinguishing between mass accident litigation and mass tort 
litigation for exposure to hazardous device in context of propriety of class certi-
fication), cert. denied, 459 U.S. 1171 (1983). Professor Vairo examines the applica-
ability of federal common law to mass tort litigation regarding hazardous 
products. She points out that mass tort litigation poses serious doctrinal ques-
tions under Erie and its progeny, and argues that Erie does not require state law 
application in mass tort litigation. See Vairo, supra note 3, at 173.

(5th Cir.), aff’d on rehearing, 781 F.2d 394 (5th Cir. 1985), cert. denied, 106 S. Ct. 
3339 (1986). This case will be examined in detail infra, notes 190-211 and ac-
companying text.

185. 750 F.2d 1314, 1336 (5th Cir.), aff’d on rehearing, 781 F.2d 394 (5th 
Cir. 1985), cert. denied, 106 S. Ct. 3339 (1986). Figures that have been produced 
very widely, and the disparity is understandable given the pervasiveness of the product:

Any exposure to this substance [asbestos], even to a relatively minute 
amount, can precipitate the development of asbestos-related disease. 
In particular, mesothelioma, an invariably fatal cancer, can result from 
extremely low exposure levels. The long latency periods for asbestos-
related disease, usually ranging between 15 and 40 years, make it diffi-
cult to ever determine if all possible claimants exposed within a given 
time period have been identified.

Id. (footnotes omitted). One reason for the unpredictability of the ultimate
(1) the overworked justice systems and (2) the relatively limited number of defendants. First, how should an equitable form of relief be awarded given that the source of funds is nearly depleted? Second, how should the costs of litigating a mass tort claim be minimized so that the victims may recover an amount greater than the litigation costs?

Various federal courts have discussed the monstrous inequities of mass tort litigation awards and the epidemic of mass tort suits in the court system. In several recent decisions, courts have discussed the implications of fashioning federal common law for mass tort litigation compensation.

number of asbestos suits is the fact that individuals who have worked with asbestos are only presently filing lawsuits. Id.

186. Id. at 1338-40. Twenty-one thousand claimants filed asbestos-related lawsuits by August 1982. Id. at 1336. By March 1983, the figure increased by 3000 claims. Id. (citing Kakalik, Ebener, Felstiner & Shanley, Costs of Asbestos Litigation 12 (Institute for Civil Justice, 1983)). At the time of the decision in Jackson, the average rate of new suits being docketed was 500 per month. Id. (citing Asbestos Litig. Rep. (Andrews) 9,101 (Oct. 19, 1984); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573, 580-81 (1983)). Conversely, of 300 total named defendants, 16 are named in half of the suits. Id. at 1340. The assets of the producers and their insurers is considered to be less than their ultimate liability. Id. at 1339-40.

187. See id, at 1330 (Clark, C.J., dissenting). The dissent discusses the reality of the exhausted pot of funds by noting past and present defendants instituting bankruptcy proceedings. Id. at n.2 (Clark, C.J., dissenting).

188. See In re School Asbestos Litig., 789 F.2d 996, 1001 (3d Cir. 1986) (citing Hensler, Asbestos in the Court 1 (Institute for Civil Justice, 1985)), cert. denied, 107 S. Ct. 182 (1986). A Philadelphia Common Pleas Judge was quoted by the court:

Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the court, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in the excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure.

Id. at 1001 (quoting Hensler, Asbestos in the Court 42 (Institute for Civil Justice, 1985)). The United States Court of Appeals for the Third Circuit in School Asbestos Litigation quoted an example offered by the same judge noted above, "'[i]n the case involving the man who most counsel thought to be the sicker of the two, the jury awarded $15,000. For the other plaintiff, the jury awarded $1,200,000. These results made this litigation more like roulette than jurisprudence.' " Id. at 1001 n.3 (quoting Hensler, Asbestos in the Court 42 (Institute for Civil Justice, 1985)).

189. See id. at 1001; Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1329 (5th Cir.), aff'd on rehearing, 781 F.2d 394 (5th Cir. 1985), cert. denied, 106 S. Ct. 3339 (1986).

190. See supra note 75. In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981). The court in School Asbestos Litigation stated that the "national dimensions of the problem" have attracted much attention to the suggestion of a congressional formulation in this area. School Asbestos Litigation, 789 F.2d at 1001. However, the court did not further address its views on federal common law for mass tort litigation.
1. Jackson v. Johns-Manville Sales Corporation

In Jackson v. Johns-Manville Corp., a former shipyard worker stricken with asbestosis brought a diversity action for strict tort liability against manufacturers of asbestos, for failure to give warnings of the dangers associated with asbestos exposure. The United States Court of Appeals for the Fifth Circuit held that plaintiffs' recovery for compensatory and punitive damages must be based on state law rather than on federal common law. The court declined to adopt defendant's reasoning that federal common law should be fashioned due to the danger that recovery by plaintiffs in some states would limit the recovery of those in other states through depletion of limited funds. Additionally, the court was not persuaded to find a compelling federal interest

191. 750 F.2d 1314 (5th Cir. 1985). This litigation involves a trilogy of Fifth Circuit opinions, of which the cited case, known as "Jackson II," is the second. In Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) ("Jackson I"), the court affirmed in part a jury award for the plaintiff and remanded in part on evidentiary issues. This order was vacated, however, when the court voted for an en banc rehearing. Id. On rehearing, the court held that federal law could not be applied to the issues at hand, and, therefore, certified questions for the Mississippi Supreme Court to decide as a matter of Mississippi law. This opinion is referred to as "Jackson II," 750 F.2d 1314. After the Mississippi Supreme Court denied certification, Jackson v. Johns-Manville Corp., 469 So. 2d 99 (Miss. 1985), the court, on rehearing en banc, itself resolved the issues as a matter of Mississippi law. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) ("Jackson III"), cert. denied, 106 S. Ct. 3339 (1986).

192. Jackson II, 750 F.2d at 1316. James Jackson, in 18 years of work as a sheet metal mechanic and leaderman, had been exposed to significant quantities of asbestos dust. Id. Seven years after leaving the shipyard, Jackson was diagnosed as having asbestosis, "a progressive and incurable pulmonary disease caused by exposure to asbestos. As a result of the asbestosis, Jackson's life expectancy was reduced and his lung capacity significantly impaired . . . . Jackson alleges that his . . . risk of contracting lung cancer and other malignancies [was markedly increased]." Id. Jackson was suing as an individual against three manufacturers of asbestos, since class certification had been denied and other defendants had either settled or been granted summary judgment. Id.

For a discussion of the Jackson II decision, see Vairo, supra note 3, at 215-20.

193. Jackson II, 750 F.2d at 1327. The court recognized that federal judges should fashion federal common law where issues are involved which are of "uniquely federal concern" (citing Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981)). Id. at 1323. However, since defendants had not identified a right or duty of the federal government which would be affected by the application of state law, the court declined to create a federal rule. Id. at 1325.

194. Id. at 1324. The court relied on two Supreme Court cases dealing with allocation of water rights between states to defeat defendants' argument that a federal interest is involved when recovery by parties of one state interferes with the interests of those in another state. Id. (citing Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)). The court distinguished cases involving water rights, when a decision of a single state could not be conclusive because of a conflict between "quasi-sovereign bodies over shared resources," and the case at hand, where the conflict did "not involve the rights and duties of states as discrete political entities." Id.
involved in ensuring compensation for injured parties while maintaining government asbestos suppliers.\textsuperscript{195} Instead, the court ruled that "this case is not an appropriate one for the creation of a federal common law because of the absence of a uniquely federal interest and the practical problems that would attend the displacement of state law."\textsuperscript{196} While acknowledging the desperate need for federal legislation in the area of asbestos injuries, the court interpreted congressional silence on the matter as a lack of authorization for judicial action.\textsuperscript{197} The litigation resulted in recovery by the plaintiff of both compensatory and punitive damages under state law.\textsuperscript{198}

The dissenting circuit judges in the \textit{Jackson} case persistently maintained that the majority not only decided the case incorrectly, but that the Fifth Circuit was an inappropriate forum to entertain the question of federalism.\textsuperscript{199} With respect to the decision of the majority to look to state law as controlling, the dissenters presented compelling arguments pointing to the conclusion that state law should not control defendant’s liability. First, the dissenters pointed out that, while in a literal sense the case involved the interests of one plaintiff, practically the case would

\textsuperscript{195} \textit{Id.} at 1324-25. The court reasoned that, even if it accepted defendant’s argument that national interests were involved, the court could not act without an indication from Congress either directing it to act or outlining a policy that it could enforce. \textit{Id.} Since Congress had not made a policy, the court could not act. \textit{Id.} at 1325. The court added that the federal interest urged by defendants was too remote to qualify as a federal interest which compels judicial action. \textit{Id.} The court similarly rejected the argument that it should take action in the interest of “doing justice,” since such was too abstract and vague to sustain a federal common law rulemaking. \textit{Id.} at 1325-26.

\textsuperscript{196} \textit{Id.} at 1327.

\textsuperscript{197} \textit{Id.} The court focused on the fact that it required congressional direction before acting and that no such direction existed. \textit{Id.} at 1325. The court noted that some members and committees of Congress had taken interest in the asbestos litigation problem, but that Congress itself had made no policy. \textit{Id.} The court reiterated this position in \textit{Jackson III}, in light of the fact that Congress remained silent “in the face of a desperate need for federal legislation.” \textit{Id.} F.2d at 415.

\textsuperscript{198} \textit{Jackson III}, 781 F.2d at 415. In \textit{Jackson II}, the court, after declaring the inapplicability of federal common law, certified questions concerning tort liability to the Mississippi Supreme Court, since Mississippi state law was not settled on those issues. \textit{Jackson II}, 750 F.2d at 1327-29. These issues included liability for punitive damages, mental distress, and future medical costs. \textit{See id.; Jackson III}, 781 F.2d at 396. The Mississippi Supreme Court, however, declined certification. 469 So. 2d 99 (Miss. 1985). The court in \textit{Jackson III} was, therefore, left to determine liability under Mississippi law. Following a detailed analysis of the state law, the court concluded that the plaintiff was entitled to damages on all the issues in question. \textit{Jackson III}, 781 F.2d at 396-415.

\textsuperscript{199} Both \textit{Jackson II} and \textit{Jackson III} were en banc proceedings of the Fifth Circuit, and in both, the same five judges dissented from the nine-member majority (in \textit{Jackson II}, one judge concurred). \textit{Jackson II}, 750 F.2d at 1315-16, 1329; \textit{Jackson III}, 781 F.2d at 396, 415. The bases for the dissent regarding the federal common law issue were stated thoroughly in the \textit{Jackson II} dissent, 750 F.2d at 1329-33, and were reiterated in \textit{Jackson III}, 781 F.2d at 415-17.
affect the rights of tens of thousands of injured parties. In regard to this, the dissenters noted that the majority was responding to defendant counsel's urge to be consistent with the general rule of case-by-case analysis, rather than responding in an innovative way to a unique problem wholly inconsistent with courts' previous experiences.

Second, the dissenters focused on the problem created by applying various and inconsistent states' laws to similarly situated plaintiffs who would be trying to recover from the same limited fund. The dissenters characterized this problem as one involving an interstate controversy, necessitating the formation of federal common law. In this regard, the dissenters analogized the asbestos litigation to cases involving interstate water rights, wherein federal courts fashioned federal common law to divide equitably scarce resources.

200. Jackson II, 750 F.2d at 1329-30, 1333 (Clark, C.J., dissenting); Jackson III, 781 F.2d at 416 (Clark, C.J., dissenting). The dissenters highlighted the sheer numbers of suits already in federal court dockets and argued that practical considerations precluded treatment of Jackson's case as simply one individual damages action. Jackson II, 750 F.2d at 1329, 1333 (Clark, C.J., dissenting); Jackson III, 781 F.2d at 416 (Clark, C.J., dissenting). For a compilation of texts and articles dealing with the practical issues involved in asbestos litigation, see Jackson III, 781 F.2d at 416 n.2 (Clark, C.J., dissenting).

201. Jackson III, 781 F.2d at 415 (Clark, C.J., dissenting). The dissent did not blame defendant's counsel for espousing such an argument in light of counsel's obligations to their present clients. Instead, the dissenters found fault with the majority's short-sighted resolution, since courts do have the responsibility of anticipating the problems their rulings will cause. Id. (Clark, C.J., dissenting).

202. Jackson II, 750 F.2d at 1330-31 (Clark, C.J., dissenting). The dissenters were influenced by the likelihood that, through such a piecemeal case-by-case approach, initial plaintiffs in states with broad recovery laws would deplete the available assets of the defendant companies; this would preclude recovery by deserving litigants whose suits are brought later on in states having more restrictive recovery laws. Id. at 1330 (Clark, C.J., dissenting).

203. Id. at 1331 (Clark, C.J., dissenting). The interstate controversy was rooted in divergent state laws and limited resources. Each state has an interest in the recovery of its citizens, since uncompensated citizens may burden the state. Id. at 1330 (Clark, C.J., dissenting). Since one state cannot control the tort law of another, "[a] state seeking to protect its own citizens can only shape its law to maximize the recovery of its own early plaintiffs." Id. (Clark, C.J., dissenting). Since the dissenters saw this situation as one involving an interstate controversy, they would have applied a federal common law rule. Id. at 1331 (Clark, C.J., dissenting). The dissenters rejected the majority's position that to qualify as an interstate controversy, a conflict must be between states as individual entities. Id. (Clark, C.J., dissenting). The dissenters noted that federal common law has been fashioned when the interstate controversy involved enforcement of private rights. Id. (Clark, C.J., dissenting) (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (action to enforce private rights of corporation)).

204. Id. at 1331-32 (Clark, C.J., dissenting). The dissenters cited Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) and Kansas v. Colorado, 206 U.S. 46 (1906), which involved interstate rights to water passing through two states, where neither state's law could resolve the issue. In these cases, the dissenters pointed out that federal common law was created to equitably divide scarce resources, since the conflicting states' laws could not be
Third, the dissenters acknowledged Congress' lack of action but argued that such silence does not preclude the courts from acting. Rather, they argued that unlike the Congress, the courts are obligated to decide the cases before them.

The dissenters, while they argued that the Jackson litigation called for the formation of federal common law, did not attempt to formulate such law themselves. Instead, they insisted that the questions of liability should have been certified to the United States Supreme Court in light of massive present and future litigation. The dissenters characterized the asbestos litigation problem as one of national proportions, requiring a formation of national policy. Consequently, to further the goal of consistency, they would have the Supreme Court address the problem. The dissenters recognized that any policy or rule made by any one of the circuits would only bind that jurisdiction, thereby perpetually applied to achieve a just result. Jackson II, 750 F.2d at 1331 (Clark, C.J., dissenting). This reasoning applied to asbestos litigation, they argued, because "the finite pool of assets available to satisfy an infinite number of claims is an identical value to the limited water available to serve many riparian owners." Id. at 1331-32 (Clark, C.J., dissenting).

205. Jackson II, 750 F.2d at 1332-33 (Clark, C.J., dissenting); Jackson III, 781 F.2d at 415 (Clark, C.J., dissenting). The dissenters did not quarrel with the majority's view that Congress should take action on the issue of asbestos litigation. However, they disagreed that congressional inaction necessitated judicial inaction as well. The dissenters also pointed out that judicial action did not preclude congressional action, since Congress could always take steps to preempt a court ruling. Jackson II, 750 F.2d at 1333 (Clark, C.J., dissenting). Rather then hindering congressional action, the dissenters believed that judicial action would enhance the ability of Congress to deal with the asbestos problem. Id. (Clark, C.J., dissenting).

206. Jackson II, 750 F.2d at 1332-33 (Clark, C.J., dissenting); Jackson III, 781 F.2d at 415 (Clark, C.J., dissenting). "Courts enjoy no comparable ability to refuse to decide cases brought before them." Jackson II, 750 F.2d at 1332-33 (Clark, C.J., dissenting). Since the dissenters interpreted the "case before them" as involving the rights not only of Jackson but of tens of thousands of others as well, they did not believe the decision should be based on Jackson's claim alone. Id. at 1333 (Clark, C.J., dissenting).

207. Jackson II, 750 F.2d at 1330, 1335 (Clark, C.J., dissenting); Jackson III, 781 F.2d at 416, 417 (Clark, J., dissenting).

208. Jackson II, 750 F.2d at 1335 (Clark, C.J., dissenting); Jackson III, 781 F.2d at 416 (Clark, C.J., dissenting). The dissenters took note of the Mississippi Supreme Court's refusal to certify the questions as requested by the majority. Jackson III, 781 F.2d at 416-17 (Clark, C.J., dissenting) (certification was denied in Jackson v. Johns-Manville Sales Corp., 469 So. 2d 99 (Miss. 1985)). While the Mississippi Supreme Court did not provide an explanation for declining to rule on the questions presented, the dissenters believed it plausible that the state court either agreed with the Jackson II dissent that the questions were for the Supreme Court, or that the questions were improper. Id. (Clark, C.J., dissenting).


210. Id. The dissenters repeatedly stressed the need for a national policy, a need to which a national policy-maker, either Congress or the Supreme Court, must respond. Id.; Jackson II, 750 F.2d at 1335 (Clark, C.J., dissenting).
It is submitted that the dissent's explanation of the propriety of federal common law applies to the area of mass tort litigation in general. As the dissent noted, there are two situations in which federal common law governs state law. First, it governs when the rights and duties of the United States as sovereign are of concern. Second, it governs when the interstate nature of the controversy makes it inappropriate to resolve the dispute under state law. In the area of mass tort litigation, the second justification for federal common law applies. Because the funds from which a plaintiff can recover are limited, and in light of the numbers of present and possible plaintiffs, recovery by one plaintiff necessarily affects the recovery of other plaintiffs. Divergent state law compounds this problem, by adding a factor into the recovery equation which is unrelated to a plaintiff's actual injury. Under these circumstances, state law application truly does "consume the purpose of the state law itself."

Nor should congressional inaction be a bar to federal judicial action. As was noted by the majority and dissent in the Jackson litigation, while numerous bills had been proposed in Congress concerning compensation for asbestos-related injuries, none had been adopted.

---

211. Jackson II, 750 F.2d at 1330 (Clark, C.J., dissenting).
212. Id. at 1331 (citing Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981)).
213. Id. Examples of cases creating federal common law based on rights and duties of the United States include United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (creation of federal common law to resolve dispute concerning land acquired by United States pursuant to federal statute), and Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (creation of federal common law to determine rights of United States in Federal Reserve check fraudulently cashed). See also supra notes 139-42 and accompanying text.
214. Jackson II, 750 F.2d at 1331 (Clark, C.J., dissenting). The dissenters provided examples of judicial action to create federal common law to resolve interstate disputes, noting cases involving private and state rights to interstate water. Id. at 1331-32 (Clark, C.J., dissenting). See supra notes 202-03 and accompanying text.
215. See Vairo, supra note 3, at 187 ("The fact that [in multi-tort litigation] there are competing state interests ... which must be resolved is in itself a countervailing consideration calling for courts to consider applying a federal rule.").
216. Jackson II, 750 F.2d at 1330 (Clark, C.J., dissenting).
217. Id.; see Vairo, supra note 3, at 172 ("[F]ederalism prevents litigants involved in cases throughout the country from obtaining uniform results.").
218. Jackson II, 750 F.2d at 1331 (Clark, C.J., dissenting).
219. Id. But cf Vairo, supra note 3, at 172 (where Congress has enacted various statutes regulating hazardous substances, interests involved in multi-tort litigation allow courts to fashion federal common law).
Clearly, congressional action would have provided the answer to, or at least direction for, Jackson’s and others’ claims. Nonetheless, the Supreme Court has stated that Congress alone cannot be completely responsible for balancing conflicting interests, rather this responsibility must be shared by federal courts. It should again be noted that if Congress finds judicial action overreaches judicial authority or misstates federal policy, Congress can clear the matter through legislation.

In a recent Second Circuit decision, the court held that actions brought by numerous veterans injured in Vietnam by exposure to herbicides, including “Agent Orange,” supplied by defendant manufacturers to the United States, were not within the jurisdiction of the federal courts because they were not governed by federal common law. The court relied on Miree v. DeKalb County and Wallis v. Pan American Petroleum Corp. in reaching its determination that state law controlled the compensation); H.R. 5224, 97th Cong., 1st Sess. (1981) (asbestos health hazards compensation). Jackson H, 750 F.2d at 1325 n.17 (majority opinion), 1332 n.11 (Clark, C.J., dissenting).

221. See Jackson II, 750 F.2d at 1392 (dissenting opinion). But see Locks, Asbestos-Related Disease Litigation: Can the Beast be Tamed?, 28 VILL. L. REV. 1184 (1983). Locks argues that proposed federal legislation will not solve the dilemma created by asbestos litigation. Id. at 1194-96.

222. See Illinois v. City of Milwaukee, 406 U.S. 91 (1972). There, the court was faced with a choice of law question regarding interstate water pollution. While there was federal law relating to the general topic of water pollution, no statute governed the question at hand. Id. at 101-03. Nevertheless, the Court applied federal common law in the interest of enacting a uniform rule, rather than inconsistent state rules, stating that “federal courts will be empowered to appraise the equities.” Id. at 107 & n.9 (citing Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir. 1971)). For a discussion of Milwaukee, see supra notes 127-29 and accompanying text.

223. See Milwaukee, 406 U.S. at 107; Jackson II, 750 F.2d at 1333 (Clark, C.J., dissenting).


225. Id. at 988. Originally brought in 1978, this consolidated action involved over 800 plaintiffs claiming either injury for herbicide exposure or risk of injury due to exposure. Id. at 988. Theories of recovery included strict product liability, negligence and breach of warranty. Id. at 989. After various amendments to the complaint, the defendant producers in this case moved to dismiss for lack of subject matter jurisdiction. Id. The district court denied the motion, holding jurisdiction of the federal courts was proper since the claim arose under federal common law. Id. at 990-92. Defendants requested certification of the jurisdiction issue, which the circuit court granted. Id. at 988. Therefore, the only question the court faced was whether the district court properly denied the motion to dismiss on the grounds of jurisdiction invoked under federal common law. Id. at 990, 995. The court reversed the district court, holding federal common law was not invoked, thereby granting the motion to dismiss. Id. at 995. This case is discussed in Vairo, supra note 3, at 208-15.

226. 433 U.S. 25 (1977) (state law controls diversity dispute arising out of aircraft crash where no substantial right of United States is affected by outcome).

227. 384 U.S. 63 (1966) (state law controls determination of contract rights
tort actions for damages and equitable relief. 228

The court in *Agent Orange* reviewed the district court's application of a three part analysis, developed in *Miree* and *Wallis* and its conclusion that federal common law should be created. 229 The district court examined: "(1) the existence of a substantial federal interest in the outcome of the litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law." 230 The court rejected the district court's conclusion that these three steps all favored the application of federal common law. 231 Since the court found no compelling federal interest, it did not examine the impact of state law application on either federal or state interests. 232

The court in *Agent Orange* rejected the district court's characterization of the interests of the United States in the litigation. 233 The district court had identified two relationships in which the government had an interest: (1) the relationship between the government and its soldiers, and (2) the relationship between the government and its wartime suppliers. 234 The court stated that the district court, in finding such interests, did not consider the Supreme Court's admonition in *Wallis* and *Miree* that to find a federal interest, there must be a significant conflict between federal policy and application of state law. 235 The court found that no governmental interest was involved, since it was not a party to

---


229. *Agent Orange*, 635 F.2d at 990. The district court relied on these cases because they involved application of federal common law to disputes between private litigants. *Id.*

230. *Id.* The district court found federal interests in the relationships between the United States and its soldiers and its wartime suppliers. *Id.* at 990-91. The district court found these interests compelling due to the large number of affected veterans and the potentially huge liability of the government's suppliers. *Id.* at 991. With respect to the second part of the test, the district court found that these federal interests would be adversely affected by application of state law, since doing so would cause unfairness and uncertainty to both veterans and suppliers. *Id.* Regarding the third stage in the test, the district court held that state interests would not be undermined by application of federal common law, since state tort law had not yet developed to deal with the type of tort question presented. *Id.*

231. *Id.* at 993.

232. *Id.* at 995 n.11.

233. *Id.* at 995-95.

234. *Id.* at 990-91. For a description of the district court's characterization of this interest, see *supra* note 229.

the action.\textsuperscript{236} Therefore, whatever interest there might be in uniformity, it was not federally based.\textsuperscript{237} The court also pointed out that there was no clear federal policy to apply, since the government's interests in its soldiers and its suppliers were divergent.\textsuperscript{238} Since Congress had not made a policy statement concerning the "Agent Orange" problem, a problem the court saw as one particularly requiring congressional definition, the court chose to wait for Congress to decide the difficult policy questions.\textsuperscript{239}

It has been noted that the \textit{Agent Orange} court overlooked the fact that federal interest is only important to determine the content of a common-law rule, not to decide whether federal common law should be made.\textsuperscript{240} It is submitted that it is not necessary to find a federal interest in order to justify the creation of federal common law. This is because there are no clear cut boundaries for federal common law.\textsuperscript{241} A court only needs to have in its hand a congressional policy and interest as a guide before developing the rule's substance.\textsuperscript{242}

Appropriately, a party should be required to present a significant federal interest when the issue is whether the court has subject matter jurisdiction.\textsuperscript{243} Accordingly, if a court has jurisdiction, but the issue is a choice-of-law question, the amount of federal interest must be greater

\textsuperscript{236} \textit{Agent Orange}, 635 F.2d at 993 (distinguishing United States v. Standard Oil Co., 332 U.S. 301 (1947), and Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) which fashioned federal common law when the United States was party).

\textsuperscript{237} \textit{Id.} at 993-94. The court stated that lack of uniformity was part of the federal system, and that "uniformity is not prized for its own sake" in the absence of an identified federal interest. \textit{Id.}

\textsuperscript{238} \textit{Id.} at 994. The court noted that in cases which apply federal common law to protect the interest of the federal government, the government's interest is "monothetic," whereas here the interests were in opposition to one another. \textit{Id.} The interests of the veterans and of the suppliers were anything but uniform, so that each group could only benefit by showing favor over the other. \textit{Id.}

\textsuperscript{239} \textit{Id.} at 994-95. The court noted that while Congress was aware of the Agent Orange problem, it had not made federal policy. \textit{Id.} The court interpreted its mandate as implementing "identified" federal policy, and finding no such policy identified, it declined to act. \textit{Id.} at 995.

\textsuperscript{240} See Vairo, supra note 3, at 211. Professor Vairo argues that the \textit{Agent Orange} opinion "confuses the need to find some federal interest to justify applying federal common law with the need to find some federal interest to determine the content of the common law rule." \textit{Id.} She argues that once jurisdiction is invoked, federal courts have broad authority to determine the substance of federal rules. \textit{Id.} at 189-200, 211. While federal subject-matter jurisdiction is limited, she submits, federal common law rulemaking is not. \textit{Id.} at 211-12.

\textsuperscript{241} \textit{Id.} at 211.

\textsuperscript{242} \textit{Id.} at 212-15. Vairo argues that the court in \textit{Agent Orange} was mistaken that no federal interest was "identifiable" concerning Agent Orange litigation. \textit{Id.} at 213. She asserts that the federal interest was invoked when the various cases were consolidated and transferred to the Eastern District of New York based on a federal multidistrict litigation statute. \textit{Id.} (citing 28 U.S.C. § 1407 (1982)).

\textsuperscript{243} \textit{Id.} at 212. Vairo points out that the federal interest which must be
B. Ascertaining the Proper Source of Authority for the Content of a Uniform Federal Common Law for Mass Tort Litigation Compensation

Various sources of federal common law include common law, state law and federal policy. State law is a source for federal common law when a particular state law is widely accepted. There is, however, no unanimously accepted state law rule for mass tort litigation compensation. Hence, the court needs to ascertain whether Congress has made any statement or indicated in any way that parties ought to be compensated or protected.

When the court is questioning whether Congress made any statement regarding the mass tort litigation dilemma, it will note that the federal environmental statutes evidence congressional intent for the creation of federal common law. There are several federal environmental statutes that repeatedly provide that man and the environment are to be protected against unreasonable adverse effects. Additionally, the shown to invoke subject-matter jurisdiction is greater than that which must be shown to fashion federal common law. Id.

244. Id. Vairo adds that "once the case rises to the level of a multi-tort, the court has the power to imply a federal rule of decision based on the policies and interests Congress intended to serve when it enacted the various statutes regulating toxic materials." Id.

245. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (federal courts permitted to use their own standard to determine rights of United States in its commercial paper); United States v. Best, 573 F.2d 1095 (9th Cir. 1978) (in absence of specific federal or applicable state statute, federal court entitled to apply nonstatutory equitable remedy against drunk driver on federal enclave).

246. See, e.g., United States v. Crain, 589 F.2d 996, 999 (9th Cir. 1979) (state subrogation law adopted as federal common law in action to recover on personal guarantee of Small Business Administration loan and to foreclose mortgage securing such guarantee); United States v. Conrad Publishing Co., 589 F.2d 949, 953 (8th Cir. 1978) (Uniform Commercial Code, as adopted by state, applies in suit to collect balance due on promissory note given to publishing company and assigned to Small Business Administration).

247. Federal policy is utilized as a source for federal common law when state law is inconsistent with federal policy. See, e.g., Board of County Comm'rs v. United States, 308 U.S. 343, 351-52 (1939) (Indian allotment exempt by treaty from state taxation as long as United States held allotment in trust); United States v. Haddon Haciendas Co., 541 F.2d 777 (9th Cir. 1976) (state anti-deficiency law rejected as federal rule where it would intrude upon purpose of federal housing statute).

248. See supra note 245.

249. See Vairo, supra note 3, at 213. This article offers an analysis for establishing federal common law for mass tort litigation. Id. at 200-24.

same statutes generally provide, implicitly or explicitly, that parties should be compensated if they suffer unreasonable adverse effects due to toxic wastes.\(^{251}\)

In the Resource Conservation and Recovery Act (RCRA)\(^{252}\) citizen suit provision,\(^{253}\) any person can bring an action against any person who has contributed to or is contributing to past or present influences of any solid or hazardous waste that “may present an imminent and substantial endangerment to health or the environment.”\(^{254}\) The penalties for such an endangerment are various, but they include both civil\(^{255}\) and criminal\(^{256}\) penalties.

Additionally, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),\(^{257}\) for a pesticide to be sold or distributed in the United States, it must be registered with the Environmental Protection Agency (EPA).\(^{258}\) In order to register a pesticide, an applicant must file with the EPA a statement including particular information about the pesticide.\(^{259}\) Specifically, the EPA can request tests and results relating to the pesticide.\(^{260}\) The acquisition of this data is imperative to ensure that the “pesticide will perform its function without unreasonable adverse effects on the environment,”\(^{261}\) and that when the pesticide is used in “accordance with wide-spread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.”\(^{262}\) If any violations do occur, civil penalties may be assessed.\(^{263}\)

Finally, Congress drafted the Comprehensive Environmental Response, Compensation Recovery Act (CERCLA)\(^{264}\) which provides for the clean up of present and past contamination waste sites, ensures that present and future waste facilities are efficiently administered to prevent contamination, and provides for relief for those injured by hazardous

\(\text{References:}\)

\(^{251}\) But cf. In re “Agent Orange” Prod. Liab. Litig., 635 F.2d 987, 991 n.9 (2d Cir. 1980) (no private right of action under FIFRA); Vairo, supra note 3, at 221-22 (CERCLA provides no private remedy for personal injuries).


\(^{253}\) Id. at § 6972.

\(^{254}\) Id. at § 6972(a)(1)(B).

\(^{255}\) Id. at § 6928(a), (g).

\(^{256}\) Id. at § 6928(d), (e).


\(^{258}\) Id. at § 136a(a).

\(^{259}\) Id. at § 136a(c)(1).

\(^{260}\) Id. at § 136a(c)(1)(D).

\(^{261}\) Id. at § 136a(c)(5)(C).

\(^{262}\) Id. at § 136a(c)(5)(D).

\(^{263}\) Id. at § 136l.

wastes. It is submitted that CERCLA's concern is for the prevention of unreasonable adverse effects on man and the environment and to establish quick and effective solutions to the unfortunate, but inevitable, future contamination. Together, FIFRA, RCRA and CERCLA evidence that Congress went to great lengths to ensure that the population and the environment are protected from hazardous substances.

Congress has on repeated occasions legislatively decreed that any person who unreasonably adversely affects another must remedy the situation. Through federal legislation, a person who markets a pesticide, or who owns a waste site, is forced to accept responsibility for the adverse effects of his or her actions. From these legislative mandates, it reasonably can be argued that Congress intends mass tort offenders to be responsible for their actions that unreasonably adversely affect others.

C. Creating Federal Common Law for Mass Tort Litigation

This Comment has revealed that various environmental statutes provide for compensation for people who have suffered unreasonable adverse injuries from hazardous substances. The environmental statutes additionally evidence a congressional intent to resolve present problems as well as to ensure, through a well-organized plan, that there will be no unreasonable adverse effects in the future.

The mass tort dilemma is exposing this country to substantial confusion. Organization is the answer. It is submitted that the Court might utilize the congressional intent of the environmental statutes to evince a federal policy for the creation of federal common law in mass tort litigation. The federal common law will serve to organize, remedy and prevent such environmental hazards as asbestos exposure.

Commentators have suggested a thoughtful and well-organized procedure for use in asbestos cases. But the asbestos problem is not the end of the toxic tort dilemma, and procedural simplification will not solve the problems in mass tort litigation of limited funds and inconsistent results under state laws. Unfortunately, there will be new mass tort issues. Since Congress has not acted with respect to mass tort litigation, the Court should feel compelled to share responsibility for develop-

265. Id.
266. See supra notes 250-64 and accompanying text.
267. See supra notes 250-64 and accompanying text.
268. See supra note 249.
269. See Locks, supra note 221. Mr. Locks suggests a step-by-step approach to asbestos litigation, beginning with the filing of a notice of claims through liability arguments a court might consider. Id. at 1201-06 & nn.66-87. His procedure is designed to encourage pre-trial settlement, alternative negotiations and trial procedures as a means to simplify litigation. Id. at 1203-05.
270. Id. at 1207 & n.89; see also Vairo, supra note 3, at 167-71.
oping solutions for the issues.\textsuperscript{271}

Some of the problems behind the mass tort litigation are unnecessary litigation,\textsuperscript{272} excessive pleadings resulting in delay and heavy cost to the litigants,\textsuperscript{273} high discovery costs\textsuperscript{274} and little chance for pretrial settlement.\textsuperscript{275} Commentators suggest a procedure to be administered by privately funded organizations which would emphasize pretrial settlement in order to reduce time, cost and increase efficiency in the legal system.\textsuperscript{276} Specifically, the pretrial procedure should contain a mechanism to provide all parties with the most information for the lowest cost through the establishment of a resource center "that would provide claimants and manufacturers with information about the availability of arbitrators, factfinders, or decisionmakers."\textsuperscript{277} If, however, it is impossible to reach settlement, it has been suggested that the substantive law in regard to the granting of compensation should be revised to ensure an equitable result to both parties.\textsuperscript{278} As discussed earlier in this Comment, the results of jury verdicts are "capricious and uncertain. Sick people are being turned away from the courts, while people with minimal injuries . . . are being awarded hundreds of thousands of dollars . . . [A]sbestos litigation often resembles the casinos . . . more than a courtroom procedure."\textsuperscript{279}

It is obvious that Congress intended that a logical and coherent plan be implemented to deal with the hazardous waste problems.\textsuperscript{280} It is submitted that it is reasonable to conclude that a logical and coherent plan is essential to deal effectively with mass tort litigation. And if Congress will not act,\textsuperscript{281} it is the responsibility of the courts to respond as

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{271} For a further discussion of the advantages of utilizing federal court creativity in fashioning federal common law, see supra notes 153-67 and accompanying text.
\item \textsuperscript{272} Locks takes the position that one reason for the "rush to file suit" stems from pressure on a plaintiff's attorney to file quickly, often before a positive diagnosis. This pressure is a result of a short statute of limitations period, usually two years, even though disease may not surface until 20 years after exposure. Locks, supra note 221, at 1186-87.
\item \textsuperscript{273} \textit{Id.} at 1190-91, 1201.
\item \textsuperscript{274} \textit{Id.} at 1202.
\item \textsuperscript{275} \textit{Id.} at 1189-92. For a succinct discussion of toxic tort litigation problems, see Comment, Coping with the Particularized Problems of Toxic Tort Litigation, 28 Vill. L. Rev. 1298 (1983).
\item \textsuperscript{276} See Locks, supra note 221, at 1201-05.
\item \textsuperscript{277} \textit{Id.} at 1204. Locke presents an interesting analysis of the feasibility of such a resource center. \textit{Id.}
\item \textsuperscript{278} \textit{Id.} at 1205-06.
\item \textsuperscript{279} In re School Asbestos Litig., 789 F.2d 996, 1001 (3d Cir. 1986) (citing Hensler, Asbestos in the Court: The Challenge of Mass Toxic Torts 42 (Institute for Civil Justice, 1985)), cert. denied, 107 S. Ct. 182 (1986). For a discussion of the problems of inequities under the present system, see supra notes 188-89 and accompanying text.
\item \textsuperscript{280} See supra notes 247-64 and accompanying text.
\item \textsuperscript{281} See supra note 219 and accompanying text.
\end{itemize}
\end{footnotesize}
"[w]e confront no less than a challenge to our purpose as courts." 282

VI. CONCLUSION

The purpose of this Comment is not to propose a specific federal common law for mass tort litigation. The purpose is to remove the myth that federal common law is only permitted in a few highly unusual situations that occur in extremely rare instances. Instead, the possibilities of creating federal common law are much broader than the myth suggests. Federal common law is "a label pinned on a rule of law created by a federal court when it finds that an issue cannot be resolved directly by reference to the Constitution, a treaty, a federal statute, or state law." 283

As demonstrated by the discussion of a potential area for federal common law, 284 the need for federal common law is increasingly apparent in various areas of the law. Hopefully, legal scholars can better understand and appreciate the usefulness of federal common law as another form of lawmaking, as we remember that "no one branch [of government] has an upper hand" in the creation of the law and in the preservation of our freedom. 285 Additionally, the legal populace may be able to effectively argue for the development of the law in other areas by activating the judicial lawmaking doctrine known as the federal common law.

Jeanne Proko-Elkins

283. See Vairo, supra note 3, at 189. Vairo described the narrow and broad definitions of federal common law. Id. at 189 n.135.
284. See supra notes 178-281 and accompanying text.