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Choice of Law in Federal Bail Bond Contracts: Protecting Principles of Federalism

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CHOICE OF LAW IN FEDERAL BAIL BOND CONTRACTS: PROTECTING PRINCIPLES OF FEDERALISM

INTRODUCTION

Federal courts are often confronted with the difficult choice of law problem of whether to apply federal law or state law to a particular controversy.[1] The issue arises when Congress fails to indicate its intent as to which law applies.[2] In filling in the statutory interstices,

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1. Frequently the decision is a close one. Miree v. DeKalb County, 433 U.S. 25, 35 (1977) (Burger, C.J., concurring); Georgia Power Co. v. Sanders, 617 F.2d 1112, 1124 (5th Cir. 1980); Owens v. Haas, 601 F.2d 1242, 1248 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); Dalton Motors, Inc. v. Weaver, 446 F. Supp. 711, 712 (D. Minn. 1978) ("In the absence of congressional legislation or authorized administrative regulations, the propriety of a court . . . applying federal common law involves a difficult balance of federal and state interests."). *See generally* Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964); 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 (1957); Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969) [hereinafter cited as *Federal Common Law*]; Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084 (1964) [hereinafter cited as *Competence of Federal Courts*]; Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. Chi. L. Rev. 823 (1976) [hereinafter cited as *Adopting State Law*]; Comment, *Rules of Decision in Nondiversity Suits*, 69 Yale L.J. 1428 (1960) [hereinafter cited as *Rules of Decision*]. Choice of law problems arising under federal regulatory programs often raise difficult problems. *See generally* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024 (1967); Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013 (1953); Note, *The Role of State Law in Federal Tax Determinations*, 72 Harv. L. Rev. 1350 (1959); Note, *Federal Housing Loans: Is State Mortgage Law Preempted*, 19 Santa Clara L. Rev. 431 (1979). Choice of law must be distinguished from the concept of conflicts of laws. Conflicts of laws involves a horizontal (state-state) choice of law. "A [state-state] conflict of laws problem arises when as to a litigated issue there are relevant occurrences in two or more jurisdictions, and . . . the law affecting the substantive rights of the parties differs. In order to decide the case, the court must choose which law should be applied. This is done according to the choice of law rules of the forum." Paul & Pain, *Choice of Law in Life Insurance Litigation*, 6 Forum 1, 1 (1970). Choice of law in the context of conflict of laws relates to a choice between different state laws. For general discussions of conflicts of law principles, see A. Ehrenzweig, A Treatise on the Conflict of Laws (1962); R. Leflar, American Conflicts Law (3d ed. 1977); G. Stumberg, Principles of Conflict of Laws (3d ed. 1963); R. Weintraub, Commentary on The Conflict of Laws (1971). When the phrase "choice of law" is used in this Note, it refers to the initial choice between federal or state law which has been termed "vertical (state-federal) choice of law." Broad, *Federal Common Law: Protecting State Interests*, Fed. B.J., Spring, 1978, at 1. This initial choice of law decision is the primary focus of this Note.

2. If Congressional legislation does not specifically cover the issue in question, federal courts are faced with two distinct issues in deciding what should be the governing rule of decision in choice of law cases. First, the decision must be made whether federal interests are sufficiently implicated to require the protection of federal law. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-93 (1973); *Rules of Decision*, *supra* note 1, at 1442. If they are not, state law governs

the Supreme Court, in *Erie Railroad v. Tompkins*,[3] has recognized that our federal structure evinces such a deep respect for the statutory and decisional law of the states that state law is presumed to govern the substantive issues of the litigation.[4] Because the usurpation of state law poses a significant threat to "the balance of state-nation relationships,"[5] state law "should not be displaced without express congressional decision or clearly recognized federal need."[6]

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and the court is bound to follow precedent within the forum, as required under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and the Rules of Decision Act, 28 U.S.C. § 1652 (1976). *See* pt. II *infra*. If it is determined that state law is to govern of its own force, *see, e.g.*, Miree v. DeKalb County, 433 U.S. 25, 32-33 (1977); United States v. Yazell, 382 U.S. 341, 358 (1966); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 32-34 (1956), it is not a discretionary choice of law decision because the court has no competence to do otherwise. *See* Mishkin, *supra* note 1, at 803-04. If state law is chosen the court must then analyze and apply the law of the state. On the other hand, if federal law is chosen the second step would require "formulation" of the governing rule of decision. The crucial distinction between "competence to choose and the actual choosing, and the independence of the two matters has not always been perceived" by the courts. Mishkin, *supra* note 1, at 803. Although a court choosing to apply federal law may look to state law in formulating its rule of decision, *e.g* , United States v. Kimbell Foods, Inc., 440 U.S. 715, 721-22 (1979) (lien priority); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (labor law); Royal Indem. Co. v. United States, 313 U.S. 289, 296-97 (1941) (contract law); Board of County Comm'rs v. United States, 308 U.S. 343, 351-52 (1939) (tax law), it is not bound to do so. If the federal court does choose to rely on state law as the federal rule of decision, the law of the forum is said to be "adopted" as the federal rule. The choice of law, however, is nonetheless deemed to be federal. "State law, even if adopted as the content of the federal rule, does not govern of its own force, but only by virtue of its incorporation as the federal law." *Adopting State Law*, *supra* note 1, at 825-26 (footnote omitted). It has been urged that the state rule should be adopted where the application of a federal rule would interfere with the state's interests. *Id.* at 842; *see* United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978); United States v. Haddon Haciendas Co., 541 F.2d 777, 784 (9th Cir. 1976), United States v. MacKenzie, 510 F.2d 39, 41-42 (9th Cir. 1975). If state law is not adopted as the governing federal rule of decision, the court must formulate a rule of decision by looking to an "incredible variety of materials." *Federal Common Law*, *supra* note 1, at 1519. These would include considerations of equity and convenience, Board of County Comm'rs v. United States, 308 U.S. 343, 350-52 (1939), "principles of established . . . jurisprudence," D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring), "general contract law," Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947), and all other traditional sources. United States v. Best, 573 F.2d 1095, 1101 (9th Cir. 1978).

3. 304 U.S. 64 (1938).

4. *Id.* at 78; Mishkin, *supra* note 1, at 800; *see* notes 21-35 *infra* and accompanying text.

5. *Federal Common Law*, *supra* note 1, at 1512. *See generally Competence of Federal Courts*, *supra* note 1; *see also* Broad, *supra* note 1, at 3 ("Where the federal concern is to prevent the choice of certain rules without foreclosing other potential state selections, there is no justification for taking the primary decision away from the states.").

6. Broad, *supra* note 1, at 20-21.

In light of the principles of federalism, a court faced with a choice of law problem must determine whether "clear and substantial interests of the National Government" are present before state law may be displaced.[7] The absence of clearly enunciated criteria to aid the court in this determination, however, has led to divergent and inconsistent results.[8] The interpretation of federal bail bond contracts by federal courts is a telling illustration.

A federal bail bond[9] is a three-party contract involving the gov-

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7. United States v. Yazell, 382 U.S. 341, 352 (1966); *see* Miree v. DeKalb County, 433 U.S. 25, 29-33 (1977); Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S 29, 33-34 (1956).

8. Faced with similar circumstances, the Supreme Court and federal courts have reached differing results due to the nature of the particular federal interests involved. *Compare* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (chose federal law in a SBA transaction) *and* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (applied federal law in a land acquisition agreement concerning a federal wildlife regulatory program) *and* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (chose federal law in a controversy involving federal commercial paper) *and* United States v. Willis, 593 F.2d 247 (6th Cir. 1979) (chose federal law in an SBA transaction) *with* Miree v. DeKalb County, 433 U.S. 25 (1977) (state law chosen in a breach of contract action between the county and a federal agency) *and* United States v. Yazell, 382 U.S. 341 (1966) (chose the law of forum state to an SBA loan agreement) *and* Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956) (state law chosen in a controversy involving federal commercial paper) *and* First S. Fed. Sav. & Loan Ass'n v. First S. Sav. & Loan Ass'n, 614 F.2d 71 (5th Cir. 1980) (state law chosen in a controversy involving trademarks and trade names). Faced with the lack of guidelines to aid in the determination of what law should be applied in interpreting the guaranty agreements in Small Business Administration cases, some lower courts have turned to state law, *e.g.*, United States v. Krochmal, 318 F. Supp. 148, 151 (D. Md. 1970); United States v. Vince, 270 F. Supp. 591, 594 (E.D. La. 1967), *aff'd per curiam*, 394 F.2d 462 (5th Cir.), *cert. denied*, 393 U.S. 827 (1968), while another court has applied federal law. United States v. Dubrin, 373 F. Supp. 1123, 1125 (W.D. Tex. 1974). Other decisions simply follow the language of the guaranty agreement. United States v. Proctor, 504 F.2d 954, 956-57 (5th Cir. 1974); United States v. Newton Livestock Auction Mkt., Inc., 336 F.2d 673 (10th Cir. 1964); United States v. Immordino, 386 F. Supp. 611, 615 (D. Colo. 1974), *aff'd*, 534 F.2d 1378 (10th Cir. 1976).

9. Federal bail conditions and procedures are controlled by the Bail Reform Act of 1966, 18 U.S.C. §§ 3041, 3141-3143, 3146-3152, 3568 (1976). *See generally* Bogomolny & Sonnenreich, *The Bail Reform Act of 1966: Administrative Tail Wagging and Other Legal Problems*, 11 Ariz. L. Rev. 201 (1969); Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 Cath. U.L. Rev. 24 (1969); Note, *The Bail Reform Act of 1966*, 53 Iowa L. Rev. 170 (1967); Note, *Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach*, 57 Tex. L. Rev. 275 (1979); *see also* Ervin, *The Legislative Role in Bail Reform*, 35 Geo. Wash. L. Rev. 429 (1967); Freed & Wald, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966); Note, *Bail Reform in the State and Federal Systems*, 20 Vand. L. Rev. 948 (1967). Rule 46 of the Federal Rules of Criminal Procedure complements the Bail Reform Act and establishes broad guidelines for release, forfeiture of bail, exonera-

ernment, the principal-defendant, and the surety.[10] In assuming liability, the surety enters into a contract with the government by which the surety guarantees that the bail bond principal will appear and answer in court.[11] If the surety fails to produce the principal at the appointed time, a default will be entered and the principal will forfeit his collateral to the surety. The surety, in turn, will be financially liable for the principal's non-appearance.[12] The issue arising in the federal bail bond cases concerns the interpretation of the language of the bail bond contract.[13] The controversy typically centers on the

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tion of the surety, and supervision of defendants pending trial. Fed. R. Crim. P. 46(a)-(g). The main purpose of the Bail Reform Act is to make it easier for indigents and petty offenders to obtain bail. *See* H.R. Rep. No. 1541, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2293, 2295-96; notes 88-89 *infra* and accompanying text.

10. United States v. Martinez, 613 F.2d 473, 476 (3d Cir. 1980); United States v. Miller, 539 F.2d 445, 447 (5th Cir. 1976) (per curiam); United States v. D'Anna, 487 F.2d 899, 900 (6th Cir. 1973) (per curiam); United States v. Jackson, 465 F.2d 964, 965 (10th Cir. 1972); Williams v. United States, 444 F.2d 742, 744 (10th Cir.), *cert. denied*, 404 U.S. 938 (1971); United States v. Wray, 389 F. Supp. 1186, 1190 (W.D. Mo. 1975).

11. This contract takes the form of an appearance bond, which is a contract involving the surety and the government. *See* note 10 *supra*. It should be strictly construed in accord with its own terms. United States v. Kelley, 38 F.R.D. 320, 321 (D. Colo. 1965). A money bond should be imposed only after the court has exhausted all nonfinancial conditions provided for by the Act. *See* 18 U.S.C. § 3146(a)(1)-(5) (1976); Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423, 424 (1980). For the content of a typical bond, see Fed. R. Crim. P. (Form 17).

12. *See, e.g.*, United States v. Lujan, 589 F.2d 436 (9th Cir. 1978), *cert. denied*, 442 U.S. 919 (1979); United States v. Brizuela, 551 F.2d 249 (9th Cir. 1977); United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970); Babb v. United States, 414 F.2d 719 (10th Cir. 1968); United States v. Caro, 56 F.R.D. 16 (S.D. Fla. 1972). District courts have broad discretion in determining whether to provide relief for forfeitures stemming from a breach of bond conditions. Fed. R. Crim. P. 46(e)(2); *see, e.g.*, United States v. Stanley, 601 F.2d 380, 382 (9th Cir. 1979); United States v. Gray, 568 F.2d 1134, 1135 (5th Cir. 1978) (per curiam); United States v. Nolan, 564 F.2d 376, 378 (10th Cir. 1977). Factors taken into consideration by the court include the willfulness of the breach, the role of the bondsman in the arrest, the prejudice to the government, and any mitigating factors. United States v. Stanley, 601 F.2d 380, 382 (9th Cir. 1979); United States v. Nolan, 564 F.2d 376, 378 (10th Cir. 1977); United States v. Nell, 515 F.2d 1351, 1353 (D.C. Cir. 1975); United States v. Casanova, 472 F.2d 1223, 1223 (9th Cir. 1973) (per curiam); United States v. Foster, 417 F.2d 1254, 1257 (7th Cir. 1969); Smith v. United States, 357 F.2d 486, 490 (5th Cir. 1966). Moreover, the surety has the option of arresting the defendant and surrendering him to the court. *See* United States v. Catino, 562 F.2d 1, 3 (2d Cir. 1977). *But see* McCaleb v. Peerless Ins. Co., 250 F. Supp. 512 (D. Neb. 1965) (abuse of discretion subjected bail bondsman to liability).

13. These interpretations have been widely divergent. For example, the Fifth Circuit, in United States v. Miller, 539 F.2d 445 (5th Cir. 1976) (per curiam), applied federal common law as the choice of law. The defendant in *Miller* was tried and convicted for assaulting an FBI agent and thereafter pleaded guilty to other charges.

liability of the surety: does the liability continue automatically, or only with the express consent of the surety throughout the various stages of a criminal proceeding;[14] does it continue only until pronouncement of sentence by the trial court,[15] or does it continue throughout the appellate process.[16]

After sentencing, the trial court allowed a brief stay prior to incarceration and the defendant failed to appear. The court held that even though the contract was silent on the subject, the surety's liability "may be extended to cover reasonably brief postponements of the execution of sentence." *Id.* at 449; *see* 1977 Mercer L. Rev. 987. Following this rationale the Second Circuit, in United States v. Catino, 562 F.2d 1 (2d Cir. 1977), applied federal law and held that the language of the bail bond agreement encompassed any appellate review of the defendant's conviction. *Id.* at 3-4. On the other hand, in United States v. Dinneen, 577 F.2d 919 (5th Cir. 1978), although federal common law also was applied, the court rejected the Second Circuit's extension of *Miller* and concluded that the sureties' liability under a bail bond does not continue throughout the appellate process. *Id.* at 921. It held that the sureties' liability was limited to "brief, reasonable stays of execution of sentence." *Id.* at 922. In the recent decision of United States v. Carr, 608 F.2d 886 (1st Cir. 1979), the issue was whether the bond covered the conditions of release after the defendant's indictment or whether the sureties had limited their undertaking to the pre-indictment period. The court, applying federal law, held that the sureties guaranteed that the defendant would appear throughout the criminal proceedings, or until the sureties' obligations under the bail bond contract were terminated. *Id.* at 888-89. Most recently, in United States v. Martinez, 613 F.2d 473 (3d Cir. 1980), the Third Circuit, although not ruling on the choice of law decision, rejected the *Dinneen* court limitation of *Miller* and followed *Catino* in holding a surety liable under the bond contract. *Id.* at 478-82. In reaching its conclusion, the court turned to the "principles of contract law governing the interpretation of bail bonds." *Id.* at 477; *see* note 66 *infra* and accompanying text. An examination of the federal courts that have applied state law to the interpretation of federal bail bond contracts also evinces a wide divergence in outcome. For example, the Sixth Circuit, in United States v. D'Anna, 487 F.2d 899 (6th Cir. 1973), applied Michigan common law to a short stay of execution and held that sentencing terminated the sureties' liability. *Id.* at 901. A similar result was reached by the Ninth Circuit in United States v. Gonware, 415 F.2d 82 (9th Cir. 1969). *But see* United States v. Vera-Estrada, 577 F.2d 598, 599 (9th Cir. 1978) (indicating that *Gonware* dictum for the application of state law was not controlling but not deciding whether it should be followed). In United States v. Wray, 389 F. Supp. 1186 (W.D. Mo. 1975), however, a Missouri district court, faced with a fact pattern similar to the one in *D'Anna*, applied Missouri law but held the sureties' liability continued after sentencing. *Id.* at 1193. The *Wray* court distinguished *D'Anna* on the language of the bail bond contract. *Id.* at 1192. This Note will not analyze the substantive law of federal bail bond interpretation. For an analysis of the substantive law of bail bond contracts, see Annot., 24 A.L.R. Fed. 580, 607-11 (1975); 8 C.J.S., *Bail* § 79g (1962).

14. United States v. Carr, 608 F.2d 886 (1st Cir. 1979).

15. United States v. Miller, 539 F.2d 445 (5th Cir. 1976) (per curiam); United States v. D'Anna, 487 F.2d 899 (6th Cir. 1973) (per curiam); United States v. Gonware, 415 F.2d 82 (9th Cir. 1969); United States v. Wray, 389 F. Supp. 1186 (W.D. Mo. 1975).

16. United States v. Martinez, 613 F.2d 473 (3d Cir. 1980); United States v. Dinneen, 577 F.2d 919 (5th Cir. 1978); United States v. Catino, 562 F.2d 1 (2d Cir. 1977); Ewing v. United States, 240 F. 241 (6th Cir. 1917). A defendant's eligibility

Some federal courts have held that the liability of a surety on a federal bail bond contract should be determined by the law of the state in which the bail bond agreement was made,[17] while other federal courts have held that the substantive issues of the litigation should be determined by resort to federal law.[18] In reaching these conclusions, the courts confronted with a choice of law problem in the area of bail bond interpretation have not adequately analyzed the sufficiency of the federal interest. The courts that have chosen state law have relied on precedents that were based on a statute, no longer a law of the United States, that mandated the application of state law.[19] Those courts that have chosen federal law have merely determined that federal interests are present without ascertaining whether those interests are, in fact, sufficient.[20]

This Note will discuss the conceptual underpinnings of choice of law principles; examine some leading choice of law decisions; identify those factors that must be present to constitute a clear and substantial federal interest; and finally, in applying those factors, show that the absence of a clear and substantial federal interest in federal bail bond cases mandates, as the choice of law, the application of state law.

I. General Choice of Law Principles

An examination of the nature of the relationship between the national government and the states sheds light on the choice of law

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for bail pending appellate disposition of his case is governed by 18 U.S.C. § 3148 (1976), which provides a federal court with express guidelines for protecting the defendant's interests as well as those of the community. *See also* 18 U.S.C. § 3146 (1976) (pertaining to release in noncapital cases prior to trial and to post-conviction bail).

17. *E.g.*, United States v. Marquez, 564 F.2d 379 (10th Cir. 1977) (per curiam); United States v. D'Anna, 487 F.2d 899 (6th Cir. 1973) (per curiam); United States v. Gonware, 415 F.2d 82 (9th Cir. 1969); Swanson v. United States, 224 F.2d 795 (9th Cir. 1955); Heine v. United States, 135 F.2d 914 (6th Cir. 1943); Palermo v. United States, 61 F.2d 138 (8th Cir. 1932), *cert. denied*, 288 U.S. 600 (1933); Ewing v. United States, 240 F. 241 (6th Cir. 1917); United States v. Bussey, 452 F. Supp. 891 (M.D. La. 1978); United States v. Wray, 389 F. Supp. 1186 (W.D. Mo. 1975).

18. *E.g.*, United States v. Carr, 608 F.2d 886 (1st Cir. 1979); United States v. Dinneen, 577 F.2d 919 (5th Cir. 1978); United States v. Catino, 562 F.2d 1 (2d Cir. 1977); United States v. Miller, 539 F.2d 445 (5th Cir. 1976) (per curiam).

19. 18 U.S.C. § 591 (1940). Procedures and conditions for obtaining bail are now governed by the Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3143, 3146-3152, 3568 (1976). Former § 591 was interpreted as mandating the application of state law to aid in the interpretation of federal bail bonds. *See* Heine v. United States, 135 F.2d 914, 916 (6th Cir. 1943); Western Sur. Co. v. United States, 72 F.2d 457, 459 (9th Cir. 1934); Palermo v. United States, 61 F.2d 138, 140 (8th Cir. 1932); National Sur. Co. v. United States, 29 F.2d 92, 99 (9th Cir. 1928).

20. *See* note 18 *supra*; pt. II *infra*.

problem facing federal courts. Our federal structure is grounded upon a division of power between the central government and the states.[21] This division is based upon the premise that the federal government is a government of enumerated powers limited to the authority delegated to it by the Constitution, while the states, under the tenth amendment,[22] are governments of residual powers retaining all authority not specifically granted to the nation.[23] "National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case. . . . The political logic of federalism thus supports placing the burden of persuasion on those urging national action."[24]

There are certain areas, however, in which the Constitution forbids the states to act and grants exclusive power to the federal government.[25] In these areas, there is little doubt that state action is precluded and federal law applies.[26] On the other hand, the tenth amendment reserves to the individual states certain powers not dele-

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21. "[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858). *See* Diamond, The Federalist *on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 Yale L.J. 1273 (1977).

22. U.S. Const. amend. X. "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975); *see* note 27 *infra* and accompanying text.

23. B. Schwartz, Constitutional Law 45-51 (2d ed. 1979); *see* L. Tribe, American Constitutional Law §§ 2-3, 5-1 to 5-3, 5-7 to 5-9, 5-20 to 5-22 (1978). *See generally* S. Davis, The Federal Principle (1978); D. Elazar, American Federalism: A View from the States (1966); Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019 (1977).

24. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 544-45 (1954); *see Rules of Decision*, *supra* note 1, at 1446. *See also Adopting State Law*, *supra* note 1, at 826.

25. U.S. Const. art. I, § 10 prohibits the states from regulating specific areas. These prohibitions primarily involve foreign trade or relations. *Id.*

26. *E.g.*, Zschernig v. Miller, 389 U.S. 429 (1968) (foreign affairs); Board of Trustees v. United States, 289 U.S. 48, 56-57 (1933) (foreign commerce). Congress, however, does have the power to designate state law as the applicable law governing a particular area of legislation. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976) ("law of the place where the act or omission occurred" is controlling); Social Security Act, 42 U.S.C. § 416(h)(1)(A) (1976) (explicit reference to state law as to who is a "wife, husband, widow or widower" of an insured). *See also* Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946) (statute explicitly provided for state definition of real property). Under such circumstances, state law does not operate of its own force but is "incorporated" as the federal rule of decision. *See* note 2 *supra*.

gated to the United States.[27] In these areas, federal governmental regulation is limited and state law controls.[28]

Between these poles of exclusive federal competency and exclusive state competency are grey areas in which both the federal government and state governments are at liberty to regulate.[29] In these instances, if federal legislation governs the particular issue in dispute and the state law conflicts with that federal legislation,[30] the supremacy clause[31] mandates the preemption of the conflicting state law.[32]

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27. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

28. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating the application of the Fair Labor Standards Act to employees of state and local governments). *See generally* Michelman, *State's Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 Yale L.J. 1165 (1977).

29. Daniel Webster once contended that when the federal government regulates a given area, state regulation purporting to govern the same area is invalid. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 8-18 (1824) (argument of Daniel Webster). The Court, however, will sanction state regulations that supplement federal efforts. *E.g.*, Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722-24 (1963) (state statute barring discriminatory hiring upheld); California v. Zook, 336 U.S. 725, 730 (1949) (upholding state prohibition of transportation not licensed by ICC).

30. The displacement of state law is justified if the state rule frustrates any purpose of the federal legislation. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 139 (1973); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 724 (1963); Rice v. Board of Trade, 331 U.S. 247, 253-55 (1947).

31. U.S. Const. art. VI, cl. 2. The supremacy clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing on the Constitution or Laws of any State to the Contrary notwithstanding."

32. *See, e.g.*, Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942); Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940); Awotin v. Atlas Exch. Nat'l Bank, 295 U.S. 209, 213-14 (1935); West v. Harris, 573 F.2d 873, 880-81 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979). The rule of preemption, first stated in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), is the vehicle used to challenge state legislation that conflicts with a granted power exercised by Congress. *See* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 267-70 (1978). In discussing the Congressional power to regulate commerce, the Court in *Cooley* stated that subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." 53 U.S. (12 How.) at 319. Such legislation will be deemed exclusive if that is expressly stated either in a federal statute or in the statute's legislative history. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); Pennsylvania v. Nelson, 350 U.S. 497, 501-02 (1956); Schwabacher v. United States, 334 U.S. 182, 197 (1948). A federal court must commence its analysis, however, under the assumption that state law is not to be superseded by the Federal Act. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Preemption "prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of Congressional policy." Hisquierdo v. Hisquierdo, 439 U.S. 572, 584

When, however, extensive federal regulation exists in the area, but the legislation does not directly address the precise issue involved in the litigation, the court is faced with a choice of law problem. It is in this situation that the Rules of Decision Act[33] governs.

The Rules of Decision Act provides that "[t]he 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."[34] The Act, which articulates the policy of our federalism, provides that state law should govern litigation arising in federal courts, and requires that new extensions of federal

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(1979). Even in the absence of express congressional recognition that the federal regulation in question was intended to be exclusive, federal preemption may be found by implication. In Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), for example, the Court stated that "[the Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Id.* at 230. (citations omitted). A state statute is void to the extent that it actually conflicts with a valid federal statute, Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978), especially "where compliance with both federal and state regulation is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnote omitted). For an analysis of preemption, see Note, *A Framework for Preemption Analysis*, 88 Yale L.J. 363 (1978).

33. 28 U.S.C. § 1652 (1976); *see, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-93 (1973); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 465-66 (1942) (Jackson, J., concurring). *See generally* Redish & Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356 (1977). The Rules of Decision Act has been labeled a "major choice-of-law provision in the federal structure." Robertson v. Wegmann, 436 U.S. 584, 597 (1978) (Blackmun, J., dissenting).

34. 28 U.S.C. § 1652 (1976) (emphasis added). Use of federal common law as the choice of law has its origin in the "exception" to the Rules of Decision Act. The "exception" provides that if the source of the controversy is federal, "the Constitution or Treaties of the United States or Acts of Congress" may otherwise require the displacement of state law as the rule of decision. United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-93 (1973); *see* Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943); *Adopting State Law*, *supra* note 1, at 826. *See generally* Redish & Phillips, *supra* note 33. In discussing the exception in the Rules of Decision Act, Justice Blackmun, in Robertson v. Wegmann, 436 U.S. 584 (1978), stated that "[t]he exception has not been interpreted in a crabbed or wooden fashion, but, instead, has been used to give expression to important federal interests." *Id.* at 598 (Blackmun J., dissenting); *see* Georgia Power Co. v. Sanders, 617 F.2d 1112, 1115-16 (5th Cir. 1980).

power be promulgated by the legislature rather than the judiciary.[35] The interpretation of the Act in *Erie Railroad v. Tompkins*[36] overturned the longstanding doctrine that the federal courts were free to disregard state decisions in matters of "general law" and could apply a "general federal common law."[37]

Despite *Erie's* pronouncement that no *general* body of federal common law exists, courts have developed a substantial body of *specialized* federal common law.[38] The real question, therefore, in-

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35. Mishkin, *supra* note 1, at 814 n.64; *see* Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 497-98 (1954).

36. 304 U.S. 64 (1938). In *Erie*, the Supreme Court announced in broad terms the general rule for resolving a choice of law question: "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." *Id.* at 78. Federal cases can be divided into two categories. In the first category are those cases that derive federal jurisdiction from diversity of citizenship and to which the *Erie* doctrine applies. In the second category are those cases deriving federal jurisdiction from a source other than diversity of citizenship where the *Erie* doctrine does not apply directly to all aspects of the litigation. Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 Harv. L. Rev. 66, 66 (1955). It has been contended that the *Erie* doctrine "implicates . . . the very essence of our federalism." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 695 (1974) (footnote omitted); *see* C. Wright, Handbook of the Law of Federal Courts 255 (3d ed. 1976); Boner, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 Tex. L. Rev. 509, 519 (1962); Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 Cornell L.Q. 377, 380 (1967). *See generally* Redish & Phillips, *supra* note 33; Thomas, *Erosion of Erie in the Federal Courts: Is State Law Losing Ground?*, 1977 B.Y.U.L. Rev. 10; Wechsler, *supra* note 24; Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317 (1967); Younger, *What Happened in* Erie, 56 Tex. L. Rev. 1010 (1978).

37. 304 U.S. at 78. Prior to *Erie*, the federal courts had the power to frame a "general law" for the vast majority of common law issues presented to them under the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See generally* Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the* Swift *Doctrine*, 27 Emory L.J. 45 (1978); Teton, *The Story of Swift v. Tyson*, 35 Ill. L. Rev. 519 (1941). *Erie* ended the so-called regime of "general law" and articulated the general policy of focusing on the appropriate source of authority as to an issue presented to a court, whether state or federal. Mishkin, *supra* note 1, at 798-99. Subsequent Court decisions that have interpreted *Erie* have urged that federal law should apply only when "the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942); *see* Prudence Realization Corp. v. Geist, 316 U.S. 89, 95 (1942); Royal Indem. Co. v. United States, 313 U.S. 289, 294-96 (1941); Board of County Comm'rs v. United States, 308 U.S. 343, 349-50 (1939).

38. Despite the apparent rejection of a federal general common law in *Erie*, the Supreme Court later indicated that there remained a large area of "independent federal judicial decision" both within and without the realm of constitutional law. United States v. Standard Oil Co., 332 U.S. 301, 307-08 (1947); *see, e.g.*, Illinois v. Mil-

volves ascertaining the circumstances in which a federal court may displace the presumed state law with specialized federal common law. The Supreme Court's major federal common law cases[39] reveal that to apply a specialized federal common law, a court must determine that the magnitude of a federal interest is sufficient to override the "preference for choosing state law . . . embodied in the Rules of Decision Act or extracted from the Constitution's structuring of the federal system."[40] The Fifth Circuit has aptly summarized the principles of our federal system of government.

> As demonstrated by its progeny, *Erie* requires (1) that federal law apply in areas of exclusive federal competence, (2) that state law apply in areas of exclusive state competence, and (3) that state law apply in areas of concurrent federal-state competence unless (a) federal legislation or regulation directly addresses the precise and narrow issue of dispute or (b) the application of federal law is required to protect or to effectuate a valid and substantial federal interest or policy.[41]

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waukee, 406 U.S. 91 (1972) (interstate water pollution); United States v. Standard Oil Co., 332 U.S. 301 (1947) (federal relationship between a soldier and the government); United States v. Fullard-Leo, 331 U.S. 256 (1947) (public lands dispute); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal commercial paper); Board of County Comm'rs v. United States, 308 U.S. 343 (1939) (a treaty); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (rights in interstate streams). *See generally* Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975); Newman, *The Federal Common Law*, 26 Dicta 303 (1949); Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 Harv. L. Rev. 966 (1946); 43 Fordham L. Rev. 1078 (1975); *see also* Note, *Federal Housing Loans: Is State Mortgage Law Preempted?*, 19 Santa Clara L. Rev. 431 (1979); 49 N.C.L. Rev. 358 (1971); 23 Vand. L. Rev. 1384 (1970); 17 Wayne L. Rev. 178 (1971). Judge Friendly has labeled the body of federal common law "a new centripetal tool incalculably useful to our federal system." Friendly, *supra* note 1, at 421.

39. *E.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); Miree v. DeKalb County, 433 U.S. 25 (1977); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966); United States v. Yazell, 382 U.S. 341 (1966); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); United States v. Standard Oil Co., 332 U.S. 301 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

40. Georgia Power Co. v. Sanders, 617 F.2d 1112, 1127 n.7 (5th Cir. 1980) (Fay, J., concurring); *see* United States v. Little Lake Misere Land Co., 412 U.S. 580, 591-92 (1973); Hart, *supra* note 34, at 534; Mishkin, *supra* note 1, at 814 n.64; Wechsler, *supra* note 24, at 544-45; *Federal Common Law*, *supra* note 1, at 1517-31; notes 21-35 *supra* and accompanying text.

41. First S. Fed. Sav. & Loan Ass'n v. First S. Sav. & Loan Ass'n, 614 F.2d 71, 73 (5th Cir. 1980).

The determination of the nature of the federal interest implicated in any controversy is the cornerstone of federal common law analysis.[42]

II. SUFFICIENT FEDERAL INTEREST

A court facing a choice of law problem must, as a threshold issue, determine whether specific interests of the federal government are involved in the litigation.[43] There is a governmental interest when the subject of the controversy has a federal source,[44] or when the United States is a party to the litigation.[45] These determinations, however, are "only the beginning, not the end, of the analysis."[46] The presence of any one of these elements may justify the jurisdiction of the federal courts, but they do not in themselves justify the application of federal law. Although federal bail bonds arise under federal legislation and the United States is a party to the litigation,[47] the

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42. This determination should be the first step of the choice of law analysis. *See* note 2 *supra*. Major federal common law cases, however, have not effectively separated the two steps of the choice of law analysis. *See, e.g.*, Washington Steel Corp. v. TW Corp., 602 F.2d 594 (3d Cir. 1979); Owens v. Haas, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1 (1st Cir. 1978); Highway & City Freight Drivers Local 600 v. Gordon Transp., Inc., 576 F.2d 1285 (8th Cir.), *cert. denied*, 439 U.S. 1002 (1978); United States v. Chappell Livestock Auction, Inc., 523 F.2d 840 (8th Cir. 1975); United States v. Union Livestock Sales Co., 298 F.2d 755 (4th Cir. 1962).

43. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979); Miree v. DeKalb County, 433 U.S. 25, 29 (1977); United States v. Yazell, 382 U.S. 341, 346 (1966); First S. Fed. Sav. & Loan Ass'n v. First S. Sav. & Loan Ass'n, 614 F.2d 71, 73-74 (5th Cir. 1980).

44. *See, e.g.*, Miree v. DeKalb County, 433 U.S. 25 (1977); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956).

45. *See, e.g.*, United States v. Yazell, 382 U.S. 341 (1966).

46. American Invs-Co Countryside, Inc. v. Riderdale Bank, 596 F.2d 211, 217 (7th Cir. 1979); *see, e.g.*, Miree v. DeKalb County, 433 U.S. 25 (1977); Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966); United States v. Yazell, 382 U.S. 341 (1966); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); *cf.* Georgia Power Co. v. Sanders, 617 F.2d 1112, 1125 (5th Cir. 1980) (Fay, J. concurring) ("The first step should be a determination of whether the subject area is one traditionally left to state control, not whether the source of right is state or federal."). Some ill-reasoned cases have expanded the definition of a federal source and have indicated that because the United States is a party, United States v. Crain, 589 F.2d 996, 998 (9th Cir. 1979), or because the controversy touches upon a federal program, United States v. Glover, 453 F. Supp. 659, 662 (W.D. Okla. 1977), application of federal law is mandated. The Supreme Court's decision in United States v. Yazell, 382 U.S. 341, 346-48 (1966), however, clearly invalidates this analysis.

47. There is one authority in the federal bail bond interpretation cases that suggests that federal law should be chosen simply because the government's right to release prisoners on bail is derived from a "federal source." United States v. Carr, 608 F.2d 886, 888 (1st Cir. 1979).

court must still undertake the resolution of the "ultimate issue,"[48] whether a "clear and substantial interest" of the federal government is threatened with "major damage" by the application of state law.[49]

The Court has not explicitly articulated a specific test for what constitutes a "clear and substantial federal interest;" nevertheless, two general themes have emerged from the major choice of law decisions to indicate whether a federal interest is so "clear and substantial" as to compel the protection of federal law. One method necessitates the determination of whether the federal interest involved can only be effectuated by resort to a uniform rule to avoid "exceptional uncertainty."[50] Another factor that has been considered is whether the use of state law would significantly conflict with any substantial federal policy or interest.[51] This analysis is sometimes phrased in terms of whether the controversy in question "is one arising from and bearing heavily upon a federal regulatory program."[52] Only when one of the above elements exists will the federal interest be deemed so clear and substantial as to mandate the displacement of state law as the governing force of the litigation.

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48. United States v. Yazell, 382 U.S. 341, 346 (1966).

49. *Id.* at 352. This analysis should be utilized in the initial choice of law decision by the federal courts. It has been suggested by one court that because the choice of law is usually found to be federal law, courts finding that the source of the right is state law, probably "move into standard preemption analysis." Georgia Power Co. v. Sanders, 617 F.2d 1112, 1126 n.4 (5th Cir. 1980). Federal interests have been deemed sufficient to warrant the protection of federal law in cases concerning the validity of sovereign acts of a foreign power, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425-29 (1964); Perez v. Brownell, 356 U.S. 44, 57 (1958), tax determination, *see, e.g.*, Commissioner v. Stern, 357 U.S. 39, 48 (1958) (Black, J., dissenting); Watson v. Commissioner, 345 U.S. 544, 551 (1953); United States v. Pelzer, 312 U.S. 399, 403 (1941); Morgan v. Commissioner, 309 U.S. 78, 80 (1940), labor law, Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957), bankruptcy, *see, e.g.*, Wragg v. Federal Land Bank, 317 U.S. 325, 328 (1943); Chicago Bd. of Trade v. Johnson, 264 U.S. 1, 10 (1924); Highway & City Freight Drivers v. Gordon Transp., Inc., 576 F.2d 1285, 1288 n.2 (8th Cir.), *cert. denied*, 439 U.S. 1002 (1978), a treaty, Clark v. Allen, 331 U.S. 503, 516-17 (1947); Jackson v. Harris, 43 F.2d 513, 516 (10th Cir. 1930), the apportionment of interstate waters, Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931), interstate pollution, Illinois v. City of Milwaukee, 406 U.S. 91, 101-08 (1972), and the regulation of the mail. Smith v. United States, 431 U.S. 291, 303-04 (1977). *See generally* Mishkin, *supra* note 1, at 800 n.15; *Adopting State Law*, *supra* note 1, at 824-25. On the other hand, federal interests were not sufficient to displace state law in cases concerning breach of contract, Miree v. DeKalb County, 433 U.S. 25, 29, 31-32 (1977), federal commercial paper, Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34 (1956), and Small Business Administration transactions. United States v. Yazell, 382 U.S. 341, 358 (1966).

50. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

51. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966); *see* note 67 *infra* and accompanying text.

52. United States v. Little Lake Misere Land Co., 412 U.S. 580, 592 (1973), *quoted in* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979); *see* United States v. Security Trust & Sav. Bank, 340 U.S. 47, 49 (1950).

A. *Uniformity*

The Court first considered whether the application of a uniform rule would be necessary to effectuate the legislative policy or interest in the landmark decision of *Clearfield Trust Co. v. United States.*[53] The underlying controversy centered on the issuance of a check by the federal government for services performed pursuant to federal legislation. Faced with the question of whether to apply federal law or Pennsylvania law to the substantive legal issues involved,[54] the Court considered whether the federal interest could *only* be effectuated by the application of a uniform rule.[55] This test focuses on whether the "absence [of uniformity] would threaten the smooth functioning of those consensual processes that federal . . . law is chiefly designed to promote."[56]

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53. 318 U.S. 363 (1943). The major contribution of *Clearfield* was the "clear establishment of power in the federal courts to select the governing law in matters related to going operations of the national government." Mishkin, *supra* note 1, at 833. The decision, however, did not clarify the distinction between competence to choose the governing federal or state law and the actual choice. *Id.* Mishkin has postulated that *Clearfield*'s rationale should be applied "to any issue bearing a substantial relation to an established national government function." *Id.* at 801 (footnote omitted). *Clearfield* established the general and somewhat vague rule that where there is a federal interest requiring uniformity for purposes of administrative ease, federal law is the appropriate choice of law. 318 U.S. at 367. This rule has been criticized by numerous commentators. *See* Mishkin, *supra* note 1, at 828-32; *Federal Common Law*, *supra* note 1, at 1529-31; *Adopting State Law*, *supra* note 1, at 831 n. 51.

54. The Court looked to the substantive legal issues involved, the forgery of government issued commercial paper, and noted that "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources." 318 U.S. at 366 (citations omitted).

55. The Court in *Clearfield* concluded that "[t]he issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." 318 U.S. at 367. The question of whether uniformity is necessary is often determined with reference to the purpose of the federal legislation. In United States v. Pelzer, 312 U.S. 399 (1941), for example, the Court stated that "the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." 312 U.S. at 402-03 (citations omitted).

56. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966).

Although the Court in *Clearfield* found a need for uniformity,[57] the application of divergent state rules to issues arising under federal legislation does not necessarily subject the rights and duties of the United States to destructive uncertainty.[58] A court must ascertain the policies fostered by the federal legislation in question and apply state law when the federal interests are not so substantial as to warrant the protection of federal law.[59] In *UAW v. Hoosier Cardinal Corp.*,[60] for example, the question presented was whether federal or state law should govern the time limitation of Section 301 of the Labor Management Relations Act, which confers jurisdiction upon the federal district courts over suits concerning collective bargaining contracts.[61] In rejecting the application of federal law the Court noted that

> federal labor law is chiefly designed to promote . . . the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play

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57. 318 U.S. at 367.

58. Later cases have not rested their decisions solely on *Clearfield's* uniformity argument. Thus, the Court has refused to extend the federal preference to suits simply because the subject matter of the controversy was federal commercial paper. In Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956), a case involving federal commercial paper, the Court looked beyond the *Clearfield* uniformity analysis, and questioned whether the application of state law would " 'subject the rights and duties of the United States to exceptional uncertainty.' " *Id.* at 33. In response to the appellant's argument that uniformity would be fostered by the application of federal law, the Court found that no interference with federal interests in fact existed. *Id.* at 33-34; *see* Mishkin, *supra* note 1, at 833. The Court has also refused to apply federal common law in a case involving oil and gas leases which were issued by the federal government under a federal statute, Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966), or because the United States became a creditor pursuant to a provision of a federal statute. United States v. Yazell, 382 U.S. 341 (1966). Rather the Court has sought to identify the specific nature of the federal interests involved in deciding whether uniformity alone is sufficient to mandate the application of federal law. In discussing the need for uniformity for a nationwide federal program the Court in *Yazell* stated that " '[i]t is true that the Small Business Administration operates throughout the United States, but such fact raises no presumption of the desirability of a uniform federal rule with respect to the validity of chattel mortgages in pursuance of the lending program of the Small Business Administration. The largeness of the business of the Small Business Administration offers no excuse for failure to comply with reasonable requirements of local law, which are designed to protect local creditors against undisclosed action by their local debtors which impair the value of their claims.' " *Id.* at 347 n.13 (quoting Bumb v. United States, 276 F.2d 729, 738 (9th Cir. 1960)).

59. Miree v. DeKalb County, 433 U.S. 25, 35 (1977) (Burger, C.J., concurring); Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 69 (1966); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966); *see* note 70 *infra* and accompanying text.

60. 383 U.S. 696 (1966).

61. 29 U.S.C. § 185 (1976).

> 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.[62]

Similarly, although there is a need for uniform rules governing pretrial release, there is no need for uniform rules to aid in the interpretation of a bail bond contract. The purpose of the Bail Reform Act is to enable indigents to obtain bail more readily and to provide credit for pretrial detention.[63] The sole "purpose . . . of a bail bond is to insure the defendant's presence at trial, at the time of conviction, or at the time of sentencing."[64] The question of the surety's liability is raised only after the bail process has broken down.[65] Thus, lack of uniformity in this area is unlikely to frustrate in any important way the achievement of any significant goal of federal bail reform.[66]

B. *Significant Conflict*

Another factor that is indicative of a clear and substantial federal interest is whether there is a significant conflict between a federal

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62. 383 U.S. at 702.

63. *See* note 9 *supra* and accompanying text; notes 88-89 *infra* and accompanying text.

64. Resolute Ins. Co. v. State, 450 P.2d 879, 880 (Alaska 1969); *see* United States v. D'Argento, 339 F.2d 925, 928 (7th Cir. 1964) (federal bail bond); Reddy v. Snepp, 357 F. Supp. 999, 1003 (D.N.C. 1973) (state bail bond); State v. Sellers, 336 F. Supp. 816, 818 (D. Iowa 1972) (state bail bond); United States v. Fook Dan Chin, 304 F. Supp. 403, 405 (S.D.N.Y. 1969) (federal bail bond).

65. *See* note 16 *supra* and accompanying text.

66. Not only is uniformity unnecessary to promote federal policy, but as a practical matter, it is extremely doubtful that there can be uniformity of result in interpreting federal bail bonds because these bonds are negotiated on an individualized basis and "var[y] from one federal district to another." United States v. Catino, 562 F.2d 1, 2 (2d Cir. 1977). In interpreting bail bond contracts, federal courts must look to "the plain meaning of the agreement supplemented, if necessary, by any intention of the parties that may be gleaned from the circumstances." United States v. Martinez, 613 F.2d 473, 477 (3d Cir. 1980) (footnote omitted). These two principles of contract law are noncontroversial. It is the "application of these principles to the facts, that has divided the federal courts on the question [of] whether bail bonds continue through appeal." *Id.* The application of a federal rule cannot result in uniformity because the fact-finder must look to the plain meaning of the particular agreement, and to the intent of the parties. United States v. Martinez, 613 F.2d 473, 476 (3d Cir. 1980); United States v. Carr, 608 F.2d 886, 888 (1st Cir. 1979); United States v. Miller, 539 F.2d 445, 449 (5th Cir. 1976) (per curiam); Dudley v. United States, 242 F.2d 656, 658 (5th Cir. 1957); Heine v. United States, 135 F.2d 914, 917 (6th Cir. 1943). Moreover, the same contract principles are employed by courts choosing state law. *E.g.*, United States v. D'Anna, 487 F.2d 899, 901 (6th Cir. 1973) (per curiam); United States v. Gonware, 415 F.2d 82, 83 (9th Cir. 1969); Heine v. United States, 135 F.2d 914, 917 (6th Cir. 1943); Palermo v. United States, 61 F.2d 138, 142 (8th Cir. 1932), *cert. denied*, 288 U.S. 600 (1933); United States v. Wray, 389 F. Supp. 1186, 1190 (W.D. Mo. 1975). Whether applying federal or state law, such factual determinations, by their very nature, cannot be uniform.

policy or interest and the use of state law.[67] Although the Court has recently looked to whether the controversy "is one arising from and bearing heavily upon a federal regulatory program,"[68] it has analyzed the same factors that it had in determining whether there is a significant conflict between use of state law and a federal policy or interest.[69] The language has changed, but the analysis has remained the same.

A significant conflict analysis focuses on the nature of the federal interest, the hostility of state law, and the legislative intent underlying the enactment of the program.[70] "[T]here can [, however,] be no

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67. The Supreme Court in Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) stated that "[i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law* in the premises must *first* be specifically shown." *Id.* at 68 (emphasis added). *Wallis* indicates that state law should be presumed to govern in the initial choice of law decision unless federal interests would be undermined. *Id.; see Federal Common Law*, *supra* note 1, at 1517-31; *Adopting State Law*, *supra* note 1, at 824-27. A significant conflict was found in United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973). The issue in *Little Lake* was whether a state statute should govern federal land acquisitions under the Migratory Bird Conservation Act. The state statute was found to conflict with the federal land acquisition program. Thus, the federal government's contractual interest in its mineral rights and the need for certainty in land transactions warranted the application of federal law. *Id.* at 603-04.

68. United States v. Little Lake Misere Land Co., 412 U.S. 580, 592 (1973), *quoted in* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979).

69. The Court in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), concluded that "federal interests [were] sufficiently implicated to warrant the protection of federal law," *id.* at 727 (footnote omitted), and considered three essential factors: first, the controversy involved the Small Business Administration and Farmers Home Administration, which "unquestionably perform federal functions;" second, "the agencies derive[d] their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a 'constitutional function or power;' " and third, the governmental activities " '[arose] from and [bore] heavily upon [those federal programs].' " *Id.* at 726-27.

70. The significant conflict factor is also employed in preemption analysis, an area which the Court, in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), has recently recognized is conceptually similar to the choice of law problem. Citing a leading choice of law decision, the Court in *Hisquierdo* stated that there must be " 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Id.* at 581 (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)). Preemption analysis supplies courts facing choice of law problems with a framework in which to examine whether a federal interest is sufficient to rebut the presumption that state law applies. The Supreme Court has formulated analytical standards for preemption decisions. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941). Among the different criteria used by the Court are expressions such as "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." 312 U.S. at 67 (footnotes omitted). A federal statute is exclusive if the scheme of federal regulation is so "pervasive" that Congress left no room for the states to supplement it, if the statute deals with a subject in which the federal interest is dominant, or if enforcement of the state statute would interfere with administration of the federal

one crystal clear distinctly marked formula"[71] or simplistic constitutional standards for defining the parameters of the initial choice of law issue. A case-by-case approach focusing on the federal interests implicated is necessary[72] because "[t]he scope of judicial lawmaking varies inversely with the clarity of the policies discernible from the statute and its legislative history."[73]

This approach was originally enunciated in *Wallis v. Pan American Petroleum Corp.*[74] The question before the Court was whether federal or state law should govern oil and gas leases validly issued under the Mineral Leasing Act of 1920.[75] Although the Court found that the Mineral Leasing Act governed the issuance of leases among competing applicants, controlled the actual use of the leased tract to promote conservation and safety, and dealt with royalty payments to the government, it found that none of the provisions of the Act dealt with the question at hand, the rights of the parties dealing in the leases.[76] Thus, the Court could "find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area [of controversy]."[77] The lack of a "significant threat to any identifiable federal policy or interest"[78] mandated the use of state law as the choice of law.[79]

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program. Pennsylvania v. Nelson, 350 U.S. 497, 502-05 (1956). Both preemption and choice of law analyses foster the presumption that the common and statutory law of the state is to be applied. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581-83 (1979). " 'The exercise of federal supremacy is not lightly to be presumed.' " New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973), (quoting Schwartz v. Texas, 344 U.S. 199, 203 (1952)); *see* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 642, 647, 653 (1975). Both concepts involve the determination of the nature of the federal interest necessary to override state law. *Compare* Miree v. DeKalb County, 433 U.S. 25 (1977) (choice of law) *with* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (preemption).

71. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (preemption case).

72. Note, *Federal Housing Loans: Is State Mortgage Law Preempted?*, 19 Santa Clara L. Rev. 431, 432 (1979). Our federalism, which the Rules of Decision Act expresses, mandates such an approach. *See* notes 21-35 *supra* and accompanying text. "[E]ach case turns on the peculiarities and special features of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973) (preemption case).

73. *Competence of Federal Courts*, *supra* note 1, at 1090.

74. 384 U.S. 63 (1966).

75. 30 U.S.C. §§ 181-287 (1976).

76. 384 U.S. at 69.

77. *Id.*

78. *Id.* at 68.

79. Another important consideration in the Court's decision was the recognition that despite the existence of "related federal legislation in an area . . . it must be remembered that 'Congress acts . . . against the background of the total *corpus juris* of the states . . . .' " *Id.* (quoting H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953)). It is against that background that the initial choice of law decision must be made.

Similarly the lack of a significant conflict did not require federal law protection in *Miree v. DeKalb County*.[80] The Court in *Miree* held that the state law was applicable in a breach of contract action against the county by survivors of deceased airline passengers.[81] Despite the existence of a "substantial" federal interest in the regulation of air travel and the promotion of air travel safety, the Court held that any federal interest involved in the resolution of the specific breach of contract action in the case at bar was speculative[82] and that only the rights of private litigants were at issue.[83] Furthermore, no substantial rights or duties of the United States "hinge[d] on [the] outcome" of the litigation[84] because "the cause of action [was] not so intimately related to the purpose of the Airport and Airway Development Act . . . as to require the application of federal law."[85]

The choice of law analysis in federal bail bond controversies also must begin with an examination of the underlying policies of the Bail Reform Act because "[i]f there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law."[86] Although the Federal Rules of

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80. 433 U.S. 25 (1977).

81. The breach of contract action arose from grant contracts between the Federal Aviation Administration and the county whereby the county agreed to restrict the use of the land surrounding the airport to activities compatible with aircraft operations. The petitioners, as third-party beneficiaries, claimed that the county breached those contracts by maintaining a garbage dump on the land causing the crash of a jet when birds that were flying from the dump were ingested into the aircraft's engines. *Id.* at 27.

82. *Id.* at 32-33.

83. *Id.* at 30.

84. *Id.* at 31. The Court noted that even when a federal-state relationship supplies a background for a particular controversy, the issue of whether to displace state law in a priviate contract action was primarily a decision for Congress. *Id.* at 32; *see* Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1959).

85. 433 U.S. at 35 (Burger, C.J., concurring).

86. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 69 (1966). In United States v. Haddon Haciendas Co., 541 F.2d 777 (9th Cir. 1976), the court rejected an assertion that federal interests were sufficiently implicated to warrant the protection of federal law because "[t]he purpose [of the Act] is to deter the exploitive management of federally-insured projects and the resulting substandard and slum-like housing conditions that the NHA was designed to eliminate." This result would not be fostered by the choice of federal law. *Id.* at 784. Rust v. Johnson, 597 F.2d 174 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979), also focuses on the purpose of the federal legislation. There, when the city of Los Angeles foreclosed on property in which the Federal National Mortgage Association had an interest, the party to whom the city conveyed the property brought an action to eject those to whom the Department of Housing and Urban Development had conveyed the property. The court concluded that federal law should be applied, reasoning that "[t]o sustain the action of the City in this case . . . would defea[t] the purpose of the National Housing Act." *Id.* at 179. Similarly, in Glasco v. Hills, 412 F. Supp. 615 (D.N.J. 1976), *aff'd*, 558 F.2d 179 (3d

Criminal Procedure and the Bail Reform Act preempt certain areas of state substantive law governing the availability and issuance of bail bonds,[87] the legislation does not determine the obligations of the parties under a bail bond contract, that is, the civil aspect. An examination of the purpose of the Bail Reform Act, as seen in the legislative history, provides no suggestion that Congress sought to oust state law entirely from the area of federal bail bonds.

> The purpose of [the Bail Reform Act] is to revise existing bail procedures in the [federal courts] in order to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest. In addition, it will assure that persons convicted of crimes will receive credit for time spent in custody prior to trial against service of any sentence imposed by the court.[88]

The legislative history of the Act does not disclose whether state or federal law should be applied to interpret bail bond contracts. It is evident, however, that the Act did not focus upon the determination of the specific intent under the contract, but rather on the right of defendants to gain release from custody and on the conditions of that release.[89]

Cir. 1977), plaintiff-tenants sought a preliminary injunction to restrain the collection of rents authorized by the federal agency which regulates the rentals on housing projects financed under the federal housing program. In choosing to apply federal law the court noted that "in a case of this kind there is a direct federal interest, not only in the regulation of rents but also in the financing of the project. It has either loaned the mortgage funds, or insured the mortgage funds, and has either set a nominal interest rate or undertaken to pay the difference between such a rate and the actual rate." *Id.* at 620. The state law in question, not only involved the federal program, but undermined the very purpose of the program because "risk[ing] the ability of the federal government to recover its mortgage loan . . . [and] increas[ing] its . . . liability . . . [was] to strike at the federal government itself." *Id.* Moreover, "in the absence of a specific overriding federal policy, it would appear that the federal courts are bound to give effect to the state law." Hill, *supra* note 36, at 66 (footnote omitted). Rejection of state law, when no federal interest so requires, would be inconsistent with the policy of the Rules of Decision Act. *See* notes 33-35 *supra* and accompanying text.

87. *See* note 9 *supra* and accompanying text.

88. H.R. Rep. No. 1541, 89th Cong., 2d Sess. 5, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2293, 2295. Prior to the passage of the Bail Reform Act several commentators had suggested that the most significant problem of the bail system was the inability of indigents to obtain bail. *See* Ares & Sturz, *Bail and the Indigent Accused*, 8 Crime & Delinquency 12 (1962); Sullivan, *Proposed Rule 46 and the Right to Bail*, 31 Geo. Wash. L. Rev. 919 (1963); Note, *Bail or Jail*, 19 Record 11 (1964).

89. Representative Emanuel Celler further elaborated the purpose of the Act: "Among the most significant features of the Bail Reform Act proposed is the emphasis on nonfinancial conditions of release for persons charged with Federal crimes." *Fed-*

It is undisputed that a bail bond is a contract between the government and the defendant and his surety.[90] If the defendant does not appear as required under the contract, the court has discretion to declare a forfeiture upon motion from the government.[91] A motion initiated by the government to enforce a bond forfeiture is an action for "damages and is deemed civil, not criminal, in nature."[92] The proceeding is independent of the underlying prior criminal proceeding. Furthermore, this proceeding only takes place after the defendant has jumped bail; that is, only after the bail processes have broken down. Thus, the application of state or federal law to the litigation of a contract for money damages does not impinge upon the penal interests of the federal criminal justice system or interfere with the purposes underlying the Bail Reform Act.

The extent of the liabilities of each party under a bail bond contract is dependent upon the language of the undertaking and the intent of the parties as interpreted under suretyship and contract law.[93] The

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eral Bail Reform: Hearings on S. 1357 Before the Subcomm. on the Judiciary of the House of Representatives, 89th Cong., 2d Sess. 15 (1966) (statement of Rep. Celler). Representative William McCulloch stated that "[i]t is a proposal to modernize the pretrial release system in our Federal courts." *Id.* at 15-16 (statement of Rep. McCulloch).

90. *See* note 10 *supra* and accompanying text.

91. *See* note 9 *supra* and accompanying text.

92. United States v. Barger, 458 F.2d 396, 396 (9th Cir. 1972) (per curiam); *see* United States v. Plechner, 577 F.2d 596, 598 (9th Cir. 1978); United States v. Zarafonitis, 150 F. 97 (5th Cir. 1907). There is, however, a division of authority as to whether it is civil for all procedural purposes. *See* United States v. Jones, 567 F.2d 965 (10th Cir. 1977) (bond forfeiture proceeding must be filed within stated period for criminal cases). In an analogous situation, the Supreme Court has indicated that state law governs the awarding of attorneys' fees in federal court. Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-57 (1949); *see, e.g.*, Klopfenstein v. Pargeter, 597 F.2d 150, 152 (9th Cir. 1979); Schulz v. Lamb, 591 F.2d 1268, 1272 (9th Cir. 1978); Schilling v. Belcher, 582 F.2d 995, 1003 (5th Cir. 1978); Interform Co. v. Mitchell, 575 F.2d 1270, 1280 (9th Cir. 1978); Michael-Regan Co. v. Lindell, 527 F.2d 653, 656 (9th Cir. 1975). The Court in *Alyeska Pipeline* held that only Congressional legislation could change this result. In response to the decision, Congress, in 1976, enacted 42 U.S.C. § 1988 (1976) which allows attorneys' fees in suits arising under various federal statutes. *Id.* In addition, there are at least 75 statutes enacted by Congress authorizing attorneys' fees. *See* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 303-04 n.104 (1977) (listing statutes).

93. Moreover, the application of federal law actually detracts from the stability of business relationships. In structuring their transactions bail bondsmen depend upon suretyship and contract law to provide guidance in evaluating potential risks. *Cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715, 739-40 (1979) ("In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved."). The relative clarity of established state law precedents as compared to uncertain federal common law application fosters greater predictability. *Id.* The choice of federal law, enabling a court to

surety undertakes contractual duties, the breadth of which is determined by the language of the agreement.[94] The resolution of contractual disputes is far removed from the stated purpose of the Bail Reform Act and from the criminal justice system.[95]

The only conflict with a government policy or interest that the government can allege in a bond forfeiture proceeding is that the application of state law may adversely affect its right to damages as a creditor under a contract[96] and thus significantly conflict with its "federal fiscal interests."[97] This bald assertion of a public fiscal interest has met with little judicial favor in other contexts.[98] In *United States v. Yazell*,[99] the Court held that the federal interest in collecting on an individually negotiated contract did not justify the displacement of state law.[100] In reaching its conclusion, the Court stated that "there is always a federal interest to collect moneys. . . . The desire of the Federal Government to collect is understandable. . . . But this serves merely to present the question—not to answer it. *Every creditor has the same interest in this respect*; every creditor wants to collect."[101] Thus, the existence of a federal fiscal interest to collect money under a bail bond contract is not sufficient to support a finding that the use of state law will significantly conflict with federal policies or interests. If the government desires to protect its fiscal interests it may insert specific contractual provisions to make the intent of the parties explicit rather than relying on the federal courts to "invent [a federal common law] and impose it upon the States."[102] The interpretation

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fashion a federal rule from an "incredible variety of materials," *Federal Common Law*, *supra* note 1, at 1519, engenders risk and uncertainties for the respective contracting parties.

94. *See* note 13 *supra* and accompanying text.

95. Another issue that does not affect the stated purpose of the Bail Reform Act is the issuance and use of a power of attorney authorizing a person to sign a federal bail bond on behalf of another. In United States v. Bussey, 452 F. Supp. 891 (M.D. La. 1978), the court held that the issue is governed "entirely by state law." *Id.* at 895. The determination of the power of attorney issue is independent of the initial criminal procedure in securing bail.

96. "Upon forfeiture, the surety becomes the government's debtor." United States v. Plechner, 577 F.2d 596, 598 (9th Cir. 1978); *accord*, Western Sur. Co. v. United States, 51 F.2d 470 (9th Cir. 1931).

97. United States v. Catino, 562 F.2d 1, 2 (2d Cir. 1977).

98. *See* Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (public fiscal interest not compelling enough to justify residency requirement for welfare aid); United States v. Yazell, 382 U.S. 341, 348-49 (1966); United States v. Haddon Haciendas Co., 541 F.2d 777, 784 (9th Cir. 1976).

99. 382 U.S. 341 (1966).

100. *Id.* at 348-49.

101. *Id.* at 348 (emphasis added).

102. *Id.* at 353. A factor of critical importance to the Court was that the security lien in question was the product of an individually negotiated contract. In noting that

of a contract in a civil proceeding, an area traditionally regulated by the states, should be governed by reference to state law. The federal interest in the civil forfeiture proceeding must be deemed "speculative" and "remote"[103] and insufficient justification for the displacement of state law.

CONCLUSION

Federal courts, faced with choice of law decisions, should commence their analyses with the presumption, founded in the principles of federalism, that state law provides the governing rule of decision. Federal law should displace state law only under the circumstances where clear and substantial federal policies or interests in the outcome of the controversy necessitate federal law protection. The absence of a clear and substantial federal interest in federal bail bond contract interpretations and the threat of major damage to our federalism mandate the application of state law as the choice of law and governing rule of decision.

Joseph A. Coco

"[i]t must be assumed that the Small Business Administration maintains competent personnel familiar with the laws of the various states in which it conducts business, and who are advised of the steps required by local law in order to acquire a valid security interest within the various states," 382 U.S. at 347 n.13, the Court concluded that individual negotiation assures that the government has the information necessary to protect its financial interests. Federal bail bonds are also negotiated on an individualized basis.

103. Miree v. DeKalb County, 433 U.S. 25, 32 (1977); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956).