1985

Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?

Georgene M. Vairo

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol54/iss2/2

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
MULTI-TORT CASES: CAUSE FOR MORE DARKNESS ON THE SUBJECT, OR A NEW ROLE FOR FEDERAL COMMON LAW?

GEORGENE M. VAIRO*

INTRODUCTION

AGENT Orange, asbestos, DES, the Dalkon Shield and toxic wastes are only a few of the contributors to a growing national phenomenon: mass tort or "multi-tort" litigation.1 Products liability cases,2 in-

* Associate Professor of Law, Fordham University School of Law, New York; B.A. 1972, Sweet Briar College; M. Ed. 1974, University of Virginia; J.D. 1979, Fordham University School of Law; Law Clerk to the Honorable Joseph M. McLaughlin, U.S.D.C. (E.D.N.Y.). I would like to thank Stephen Fogerty for his research assistance.


This Article, however, is not concerned with mass accident cases that involve a tort occurring in one jurisdiction. Nor does it necessarily address cases like those arising out of the Bhopal/Union Carbide methyl isocyanate accident in which over 2000 people were killed and thousands injured, Amended Consolidated Complaint & Jury Demand § 47, at 14, In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984 (S.D.N.Y. June 28, 1985), when a cloud of methyl isocyanate leaked and passed over the residences of thousands living near the Union Carbide plant in India. Id. ¶ 16 at 5. Rather, it concerns a second kind of mass tort case: products liability or toxic tort cases in which a particular product or substance used or sold in interstate or international commerce causes injury at different times to persons located in many areas of the United States or the world. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980) (exposure to herbicides), cert. denied, 454 U.S. 1128 (1981); Jaffee v. United States, 592 F.2d 712 (3d Cir.) (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. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981) (contraceptive use), vacated and remanded, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); In re Swine Flu Immunization Prods. Liab. Litig., 464 F. Supp. 949 (J.P.M.D.L. 1979) (defective vaccine); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978) (DES drug); see also S. Rep. No. 97-12, 97th Cong., 2d Sess. (1982) (discussion of problems associated with hazardous wastes and suggested legal remedies) [hereinafter cited as Superfund Study]; Rheingold, The MER/29 Story—An In-
surance coverage disputes, and, increasingly, bankruptcy cases, involving these and other products and substances are flooding the federal courts in an ever-increasing volume.


These cases will be referred to as mass tort or “multi-tort” cases. The key distinction between these cases and mass accident cases is the national, and possibly international, scope of harm allegedly caused by the same or similar defective products or substances caused over a period of time.


4. Chapter 11 bankruptcy petitions have been filed by at least three asbestos manufacturers. See Asbestos Project, supra note 3, at 808. In addition, A.H. Robins Company, the maker of the Dalkon Shield, filed for bankruptcy on August 21, 1985 in the bankruptcy court in Richmond, Virginia, because the company feared that the claims and damage awards resulting from the Dalkon Shield threatened its viability. Diamond, Robins, In Bankruptcy Filing, Cites Dalkon Shield Claims, N.Y. Times, Aug. 22, 1985, at A1, col. 1.

5. The statistics are staggering. In the five years between 1978 and 1983, the number of products liability cases filed in federal courts has more than doubled, see Admin. Office of U.S. Courts, 1983 Annual Report of the Director of the Administrative Office of the United States Courts 122, 129-31, and at least ten thousand new cases are likely to be filed each year, see id. at 129. The number of products liability cases filed in the United States district courts increased another 20.6% between 1983 and 1984. See Admin. Office of U.S. Courts, 1984 Annual Report of the Director of the Admin. Office of the United States Courts 131. The number of lawsuits is likely to climb further because approximately 60 to 70 percent of cancers are attributable to various environmental contaminants. See S. Rep. No. 94-698, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Ad. News 4491, 4494; Comment, Pursuing a Cause of Action in Hazardous Waste Pollution Cases, 29 Buffalo L. Rev. 533, 537 (1980). In addition, the effects of modern chemicals may be passed from parent to child. See Hilts, Chemicals at Parent’s Job May Cause Child’s Tumor, Wash. Post, July 3, 1982, at A8, col. 1. Extrapolations from one study indicated that chemical exposures of parents might account for as many as a quarter of all childhood brain tumors. See id. Thousands of new substances and products are registered and developed each year. “The government’s 1978 Registry of Toxic Effects of Chemical Substances carried data on 7500 new products. In 1979, the
As hazardous substances increasingly infiltrate our environment and the number of multi-tort cases correspondingly rises, plaintiffs, defendants and the courts are confronted with many difficult issues not presented in conventional single incident tort cases.\(^6\) Many of the issues arise because multi-tort litigation involves large numbers of claimants...
throughout the United States and the world who have been exposed to the same chemical agent or injured by the same product over a period of time. Moreover, the claimants' illnesses frequently do not manifest themselves until years after the exposure. Indeed, the filing of bankruptcy petitions by asbestos and other product manufacturers demonstrates the tremendous exposure and scope of harm, both present and


Professor Rosenberg suggests that in mass toxic tort cases, liability proportioned to statistical probabilities would be more just than liability based on an individualized imposition of traditional proof standards requiring a preponderance of the evidence. See Rosenberg, supra, at 859. Because this rule confronts firms with an expected liability that "equals the losses attributable to their tortious conduct," id. at 866, Rosenberg argues that by thus "giving firms precisely the incentives needed to induce them to take optimal care, such a rule enables the system to achieve its optimal deterrence objective." Id. Questioning "the entire notion that 'particularistic' evidence differs in some significant qualitative way from statistical evidence," id. at 870, Rosenberg criticizes the idea "that there exists a form of proof that can provide direct and actual knowledge of the causal relationship between the defendant's tortious conduct and the plaintiff's injury." Id.

In some situations involving large numbers of injury victims, negotiated arrangements have avoided costly and protracted litigation. For example, the establishment of a settlement fund for a group of asbestos claimants hastened disposition of 680 claims, with five asbestos firms and insurance companies making significant contributions to the fund. See Settlement Fund for Asbestos Claims Established Under New Jersey Agreement, 10 O.S.H. Rep. (BNA) 1367, 1367 (1981). The fund was placed under court supervision to enhance efficiency. Id.

anticipated, caused by multi-torts. 8

Other more basic questions persist: When does the cause of action accrue? 9 What is the appropriate standard of liability? 10 Should an enterprise liability theory be applied? 11 Should punitive damages be awarded? 12 These questions involve serious legal, economic and social implications that seem to demand uniform solutions because the harm is inflicted on persons nationwide. Although consistency of result is a legitimate goal of any legal system, 3 the existing answers to these questions vary from state to state. 14 The result is a clash of concepts at the core of

8. See supra note 4. These filings raise the additional problem of obtaining compensation for future claimants who are afflicted by disease or injury, but whose share of available corporate funds may be diminished severely or wiped out entirely by judgments in favor of earlier victims or creditors of the corporation. Cf. Roginsky v. Richardson-Merrell, Inc., 376 F.2d 832, 838-42 (2d Cir. 1967) (fearing that large punitive damage award in one case may diminish corporate assets and thereby preclude recovery by other plaintiffs in subsequent litigation).


our system of government.

In the context of our federal system, each state is permitted to determine its own approach to tort issues. Thus, federalism prevents litigants involved in cases distributed throughout the country from obtaining uniform results. Congress, on the other hand, has enacted numerous statutes regulating many of the products and substances causing the harm in multi-tort cases. One would think that the supremacy of federal interests embodied in these statutes should play some role in determining the outcome of multi-tort litigation.

Since *Erie Railroad v. Tompkins*, however, it has been axiomatic that federal courts sitting in private products liability or negligence cases must apply the substantive law of the states in which they sit. This requirement promotes the idea of federalism. Nevertheless, applying the *Erie* doctrine in multi-tort cases raises fundamental questions of fairness, and sets the stage for a collision between the policies embodied by federalism and those behind the supremacy of national interests when Congress regulates dangerous substances and products. This Article argues that the continued unquestioned application of *Erie* in multi-tort litigation ignores both the national aspects of these cases and the federal policies and interests involved. To solve the confused state of multi-tort litigation, this Article proposes that the best of *Swift v. Tyson* be resur-

---

15. See infra note 45.
16. 304 U.S. 64 (1938).
17. The *Erie* Doctrine refers to the line of cases holding that state law must be applied in federal courts absent some federal law on the subject. The key cases comprising the doctrine are *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), *Byrd v. Blue Ridge Rural Elec. Coop.,* 356 U.S. 525 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1965). Each case recognizes the primacy of state substantive law in diversity actions and other cases in which a federal law does not control. See *Hanna*, 380 U.S. at 467; *Byrd*, 356 U.S. at 536-37; *Guaranty Trust*, 326 U.S. at 109; *Erie*, 304 U.S. at 78. See *Erie* Part I. In addition, the Court in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), held that a federal court in a diversity case must apply the choice of law rules prevailing in the state where the court is located. See *id.* at 496. The Court stated:

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 its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "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. If a federal case is transferred on 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). This rule evolved to prevent defendants from defeating the advantages that flow from forum state law to plaintiffs who have chosen a proper forum. See *id.* at 633-34.
18. 41 U.S. (16 Pet.) 1 (1842). In *Swift*, Justice Story wrote that federal courts could freely exercise independent judgment on what the common law should be. See *id.* at 18.
rected so that federal common law may be applied in appropriate multi-tort cases.

Despite the practicality of this approach, it is hardly surprising, in light of *Erie* and its progeny, that two courts of appeals recently have declined to adopt it. Commentators have suggested that two significant concepts, the idea of federalism and the notion of the separation of powers implicit in the constitutional plan, provide the philosophical underpinnings of the *Erie* doctrine. Nevertheless, the serious national problems presented by multi-tort cases indicate that the *Erie* doctrine should be reexamined and harmonized with the purposes of federal common law.

Accordingly, Part I of this Article discusses the *Erie* line of cases and establishes that their doctrinal basis does not require that state law invariably be applied in mass toxic tort or multi-tort litigation. Part II analyzes a line of cases demonstrating, with apologies to Mark Twain, that reports of the death of federal common law have been greatly exaggerated, and consequently that federal common law may be created to displace state law in multi-tort cases. Finally, Part III presents an analytic framework for determining when federal common law should be created and applied to displace state law in particular multi-tort cases.

I. THE APPLICABILITY OF THE *Erie* DOCTRINE TO MULTI-TORT CASES

Enough has been written about *Erie* and its progeny to fill a railroad car. Nonetheless, to determine whether the *Erie* doctrine should be ap-

---


21. See infra note 50 and accompanying text.

22. Also implicated are the doctrines of preemption of state law by federal law and of implied causes of action. This Article does not ignore the import of these doctrines. See infra notes 51, 227, 333 and accompanying text. Rather it focuses primarily on the *Erie* and federal common law lines of cases to highlight what, in essence, are the two issues in all of these doctrines: the clash between the concepts of federalism and the supremacy of federal interests, and separation of powers. For an interesting discussion of the interrelationship of these doctrines, see Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985).

23. Mark Twain, *Saying*, in J. Bartlett, *Familiar Quotations* 625 (15th ed. 1980) ("The reports of my death have been greatly exaggerated.").

24. 304 U.S. 64 (1938).

plied in multi-tort cases, we must focus again on the basic policies underlying *Erie*. This examination reveals that *Erie*’s two principal policies—avoidance of private party forum shopping, and the achievement of fundamental fairness—are not furthered by automatically applying state law in mass tort cases.

A. *The Erie Doctrine*

In *Erie Railroad v. Tompkins*, the plaintiff was walking along the defendant’s right of way in Pennsylvania when what appeared to be a door from one of the moving cars struck and injured him. *Tompkins* brought a negligence action in diversity against the railroad in the Southern District of New York. The defendant railroad argued that section 34 of the Federal Judiciary Act required application of Pennsylvania law under which *Tompkins* would be classified a trespasser, and thus the railroad could be liable only if its negligence was “wanton or willful.” The trial judge refused to apply Pennsylvania law and allowed the case to go to the jury. A judgment of $30,000 was returned in favor of *Tompkins*.

The Second Circuit Court of Appeals affirmed the district court’s judgment, stating that the question was one of general law, and that “upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is . . . .” The Supreme Court granted certiorari to determine whether a federal court was free to disregard a rule of state common law, or whether section 34 extended to state common law.

Section 34 provided:

> the laws of the several states, except where the constitution, treaties or statute of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the

---


27. 304 U.S. 64 (1938).
28. Id. at 69.
29. Id.
32. Id. at 70.
33. Id.
34. See *Tompkins v. Erie R.R.*, 90 F.2d 603, 604 (2d Cir. 1937), rev’d, 304 U.S. 64 (1938).
35. Id.
United States in cases where they apply.\textsuperscript{37}

In \textit{Swift v. Tyson}\textsuperscript{38} Justice Story had written that section 34 only required application of state statutes and that the statutes be interpreted and applied in a manner consistent with the approach of the state courts.\textsuperscript{39} The Court in \textit{Erie} disagreed and overruled \textit{Swift}.\textsuperscript{40}

Writing for the majority in \textit{Erie}, Justice Brandeis began his analysis by noting that after \textit{Swift}, the federal courts had "assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes."\textsuperscript{41} In light of modern commerce clause doctrine, the premise of Justice Brandeis' statement is dubious when applied to the facts of \textit{Erie}. Under the commerce clause, Congress may undoubtedly enact a statute regulating an interstate railroad.\textsuperscript{42}

Congress also has passed numerous laws\textsuperscript{43} regulating the conduct of manufacturers and others who are responsible for putting products such as asbestos and DES and substances such as toxic wastes and Agent Orange into the stream of interstate commerce.\textsuperscript{44} Indeed, at least six major federal agencies, pursuant to dozens of statutes, regulate those and other substances.\textsuperscript{45} Clearly then, contrary to Justice Brandeis' view,\textsuperscript{46} Con-

\textsuperscript{37} Federal Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1982)).
\textsuperscript{38} 41 U.S. (16 Pet.) 1 (1842).
\textsuperscript{39} See id. at 17-18.
\textsuperscript{40} See \textit{Erie}, 304 U.S. at 79-80.
\textsuperscript{41} \textit{Erie}, 304 U.S. at 72.
\textsuperscript{42} Congress' power under the commerce clause, U.S. Const. art. I, § 8, cl. 3, to enact legislation regulating the standard of care owed by a railroad involved in interstate commerce is beyond serious dispute. See J. Friedenthal, M.K. Kane & A. Miller, \textit{Civil Procedure} 197 (1985); Keeffe, supra note 19, at 320; Friendly I, supra note 25, at 397 n.66.
\textsuperscript{43} See infra note 45.
\textsuperscript{44} Congressional power to regulate under the commerce clause, U.S. Const. art. I, § 8, cl. 3, is very broad. See \textit{United States v. Darby}, 312 U.S. 100, 114 (1941). In \textit{Darby}, the Court upheld the constitutionality of the Fair Labor Standards Act. \textit{Id.} at 117, 123, 125. The Act regulated wages and hours by prohibiting companies from shipping in interstate commerce unless the companies adhered to minimum wage and maximum hour standards. See \textit{id.} at 109. For a general discussion of congressional power under the commerce clause, see J. Nowak, R. Rotunda & J. Young, \textit{Constitutional Law} 163-67 (1983) and L. Tribe, \textit{American Constitutional Law} 232-44 (1978).
gress has the power to declare substantive rules regulating activities affecting interstate commerce. Thus, because the federal courts have lawmaking power derived from Congress’ authority to regulate the products and substances in question, the federal courts’ development of a federal common law in multi-tort cases would not be an unconstitutional infringement of state powers.

Nevertheless, while Justice Brandeis may have incorrectly stated the constitutional powers involved, the policies underlying his argument remain. It has long been recognized that this prong of Justice Brandeis’ argument rests on the principle of federalism which suggests that it is improper for federal courts to usurp the lawmaking function that otherwise remains in the hands of the states. This view of federalism, how-


48. Professor Hill suggests that when the Supreme Court attributes a preemptive intent to Congress that Congress’ “legislative scheme effects a federal occupation of a field, negating state competence, and devolving upon the federal courts the duty of fashioning rules of decision even in the absence of any legislative guidance whatever.” See Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1028-29 (1967) [hereinafter cited as Hill II]; see also Merrill, supra note 22, at 36-40. See infra note 50.

49. For example, in Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 156 n.13 (1983), the Court suggested that the Rules of Decision Act does not require that state law apply whenever a federal statute fails to provide an explicit rule. Del Costello involved the question of the statute of limitations to be applied in collective bargaining disputes. Id. at 158. One commentator found that the Court’s conclusion “suggests that all gaps in federal statutes are to be filled by federal common law,” whether the Court adopts a federal rule or borrows a state rule. See Merrill, supra note 22 at 31 n.138.

50. See, e.g., C. Wright, Handbook on the Law of Federal Courts 355 (4th ed. 1983); Merrill, supra note 22, at 13-16. It has also been suggested that Erie presents a separation of powers problem because by creating federal general common law the federal courts are usurping congressional authority. See J. Friedenthal, M.K. Kane & A. Miller, supra note 42, at 197. Article I of the Constitution vests the legislative powers in a congress, U.S. Const. art. I, § 1, while Article III provides that the judicial power be vested in the federal courts, U.S. Const. art. III, § 1. See Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981) (“federal lawmaking power is vested in the legislative, not
ever, ignores the principle of supremacy of national interests, which is at least a coequal consideration in analyzing the federal court's lawmaking power when Congress has acted.\textsuperscript{51}

Justice Brandeis' second concern was that the rule of \textit{Swift}, rather than promoting uniformity, invited "mischievous results."\textsuperscript{52} For example, before \textit{Erie} a party could have changed citizenship solely to create diversity jurisdiction and thereby take advantage of a federal rule.\textsuperscript{53} Thus, the judicial, branch of government\textquotedblright); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 618 (1944) (the courts' function of interpreting legislation is different from the lawmaking function). Nevertheless it is axiomatic that federal courts have some lawmaking powers. See Merrill, \textit{supra} note 22, at 33. See \textit{supra} note 48. For example, when a federal court implies a private remedy, it follows the common law tradition that regards the denial of a remedy as the exception rather than the rule. Thus, no separation of powers problem is presented. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375-76 (1982). This Article argues that no separation of powers problem is presented when a court generates a federal rule until Congress affirmatively acts by legislating rules that expressly and comprehensively govern an area. Until then, the federal court must be free to interpret the Constitution and federal laws. Other authors have made similar arguments. See G. Calabresi, A Common Law for the Age of Statutes 92-93 (1982); Monaghan, \textit{The Supreme Court, 1974 Term—Forward: Constitutional Common Law}, 89 Harv. L. Rev. 1, 34 (1975).

The interstitial lawmaking that results in federal common law rules is proper as long as courts have some implicit authorization to create such rules derived from federal statutory or constitutional commands. For example, in the \textit{City of Milwaukee} litigation involving interstate water pollution, the Court held that federal common law governed. Illinois v. \textit{City of Milwaukee}, 406 U.S. 91, 103-04 (1972). After Congress enacted a new set of regulations governing the water pollution issue in that case, the basis for applying federal common law disappeared. Thus, the Court affirmed that its power to create federal common law is "subject to the paramount authority of Congress." \textit{City of Milwaukee}, 451 U.S. at 313 (quoting \textit{New Jersey v. New York}, 283 U.S. 336, 348 (1931)).

Any federalism concern arising when federal courts create federal common law may also be resolved by a positive act of Congress because the will of the states will be expressed by their representatives in Congress. See \textit{Garcia v. San Antonio Metro. Transit Auth.}, 105 S. Ct. 1005, 1018 (1985) (federal authority limited by structure of federal government, not by constitutional immunity under the tenth amendment); Merrill, \textit{supra} note 22, at 16-18, 37 (states are deemed to have acquiesced to the creation of federal common law because states are represented in Congress). This Article argues that if congressional power to regulate exists and has been generally exercised, but Congress has failed to enact specific legislation, residual power exists in the federal courts to create a federal rule of decision. See \textit{supra} note 48, \textit{infra} note 150.

51. When Congress has evidenced intent to occupy a specific field, any state law governing that area is preempted. \textit{Silkwood v. Kerr-McGee Corp.}, 464 U.S. 238, 248 (1984). Therefore, the constitutional scheme requires supremacy of national interests. When state law prevents reaching congressional goals, state law must yield. \textit{Id. See Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n}, 461 U.S. 190, 204 (1983). Accordingly, even if no specific or express legislative command exists, if the federal court finds that Congress intended some federal policy or that the Constitution suggests some identifiable federal interest, the federal court has the power to displace state law. See \textit{D. Currie, Federal Courts} 436-37 (3d ed. 1982); Hill II, \textit{supra} note 48, at 1026-30; Merrill, \textit{supra} note 22, at 36; Monaghan, \textit{supra} note 50, at 12-15.


53. \textit{See Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.}, 276 U.S. 518 (1928). Even defenders of \textit{Swift v. Tyson}, 41 U.S. (16 Pet.) 1 (1842), such as Professor Keeffe, deplore the case in which a California federal court in a diversity action by a Senator from Nevada ruled that the Senator was not the common law husband of a par-
diversity jurisdiction, which was adopted to prevent discrimination against non-citizens, actually became the source of “grave discrimination by non-citizens against citizens.” Because the litigants’ rights varied depending on whether the state or federal forum was chosen, “the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.”

Perhaps this concern of Justice Brandeis is well taken in the typical tort case where only two or three litigants are involved, the tort takes place in a determinable location, and the state court invariably applies the tort law of the state in which the wrong took place. In such a case the rule of decision should not vary from state to state and therefore arguably should not vary with the plaintiff’s choice of a federal or state forum. No specific federal interest exists in such a case, and the concept of federalism should accordingly prevail.

This reasoning, however, does not extend to multiparty lawsuits or multiple lawsuits in which persons throughout the country have been injured at different times by the same or similar substances. Moreover, an interest analysis of the choice of law question is increasingly applied in tort cases which may result in applying the law of a state other than the one where the accident occurred. It can no longer be said that a party’s rights vest in the state where the injury was incurred, or that a party is

54. Erie, 304 U.S. at 74-75. Of course, the opposite is true as well. Citizens and noncitizens alike could also become “victims” of the federal rule. See supra notes 63-72 and accompanying text.

55. Erie, 304 U.S. at 75.

56. At the time Erie was decided, the territorialist approach dominated choice of law analysis. See E. Scoles & P. Hay, Conflict of Laws § 17.2 (1982). Thus, in a tort case, the rule of lex loci delicti—the law of the place of the wrong—applied. The law of the place of the wrong generally would be the place where the injury was suffered. See id.; see also Restatement of Conflict of Laws § 377 (1934) (adopting lex loci delicti in tort cases). This rule provided certainty and ease of application. No matter where the lawsuit was brought, the parties could be sure that the law of the place of the wrong would apply. See R. Crampton, D. Currie & H. Kay, Conflict of Laws 13 (3d ed. 1981) (quoting Goodrich, Public Policy in the Law of Conflicts, 36 W. Va. L. Rev. 155, 165, 167 (1930)).

57. Indeed, since 1963, most states have rejected the strict territorial approach to choice of law and adopted more flexible choice of law approaches. R. Weintraub, Commentary on the Conflict of Laws § 6.17, at 308 (2d ed. 1980) (most jurisdictions addressing conflicts questions in tort law have supplanted situs rules with interest analysis); Scoles & Hay, supra note 56, at 560; see Weintraub, The Future of Choice of Law for Torts: What Principles Should be Preferred?, 41 Law & Contemp. Probs. 146 (Spring 1977) [hereinafter cited as Weintraub II]; see, e.g., Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751-52 (1963). For a discussion of modern approaches to choice of law in tort cases, see Scoles & Hay, supra note 56, at § 17.11 (interest analysis); id. § 17.18 (the better law approach); id. § 17.21 (the most significant relationship test).

58. For example, in Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 201, 480 N.E.2d 679, 687, 491 N.Y.S.2d 90, 98 (1985), the New York Court of Appeals held that New York law would not apply to the issue of charitable immunity in a case involving
somehow entitled to the law of a particular state. More importantly, the choice of forum in mass tort cases is not simply a choice between the "federal court . . . [or] . . . a state court a block away." Rather, as notions of personal jurisdiction expand, it is often a state-to-state choice with the plaintiff seeking to choose the most favorable procedural or substantive law or choice of law rules from among the several different states that can exercise personal jurisdiction over defendants.\(^6\) The multiplicity of modern choice of law analyses, together with the expansion of personal jurisdiction, thus provides a greater scope for disuniformity.

Because plaintiffs can often choose a federal court by structuring the case to ensure complete diversity,\(^61\) Erie permits litigants to engage in state-to-state forum shopping. When applied to multi-tort litigation, the Erie doctrine's advantage of promoting uniformity in the administration of the law of a particular state may be illusory because it may at the same time contribute to state-to-state forum shopping, which leads to a lack of uniformity. Indeed, federal court litigants may thwart whatever interests State A may have had in applying its law by suing in a federal court in State B that would choose to apply either its own law, or the law of yet another state.\(^6\) Thus, a plaintiff can thwart the equal administration of nonresident plaintiffs and defendants even though the tortious acts occurred in New York.


61. In Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806), Chief Justice Marshall interpreted the congressional grant of diversity jurisdiction, currently codified at 28 U.S.C. § 1332 (1982), to require complete diversity. Thus, plaintiffs can meet the complete diversity requirement by suing only defendants whose citizenship is different from each of the plaintiffs.

62. See supra notes 57-60 and accompanying text. The same result would obtain if
the law of a State A by choosing a federal court in a State B whose choice of law rules mandate applying another substantive law more favorable to the plaintiff. It is not the choice of a federal forum, but rather the

the plaintiff chose a state court in another state. The point is that *Erie* permits the litigants to use the federal courts to achieve the same "unfair" result. The *Erie* doctrine could prevent the application of one interested state's law because the plaintiff can sue in a federal court in another state that would apply a different rule. If the point of *Erie* is to avoid subjecting a defendant to different rules governing his primary conduct, see P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and the Federal Systems 714-15 (2d ed. 1973); H. Hart & H. Wechsler, The Federal Courts and The Federal System 634-35 (1953), *Erie* lacks relevance in a multi-tort case. A defendant's conduct could be subject to up to 50 different states' differing standards of liability. In addition, application of *Erie* in multi-tort cases contributes to state-to-state forum shopping, which arguably burdens interstate commerce because a defendant's conduct is subject to the vagaries of so many different rules. State regulation that operates to discriminate against interstate commerce by disrupting uniform standards of conduct implicit in federal policy violates the commerce clause. See, e.g., Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (finding no constitutional violation because state regulation did not burden interstate commerce). Indeed, even in the absence of federal legislation, the commerce clause restricts the reach of state laws. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 313 (1851). Accordingly, the commerce clause prohibits federal courts from being used in a way that would create a burden on interstate commerce.

63. Perhaps Justice Brandeis divined another kind of unfairness—the unfairness that would result if some litigants were denied a federal forum, and accordingly, the opportunity to use a federal rule. For example, in suits lacking complete diversity, see Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267-68 (1806), or in which there is diversity but removal is unavailable because one of the defendants is a citizen of the forum state, see 28 U.S.C. § 1441(b) (1982), the plaintiff's choice of a state court will deny the parties the opportunity to argue that a federal rule should apply. In these cases, unfairness would arise because the lack of a federal forum precludes the parties from arguing for a federal rule.

Let us, however, determine whether there will be unfairness to plaintiffs or defendants in the usual case. Plaintiffs can insure a federal forum, and accordingly, the opportunity to take advantage of federal law, either by naming only diverse defendants, see 28 U.S.C. § 1332 (1982), or if all defendants are co-citizens by having a diverse named plaintiff bring a class action. See Snyder v. Harris, 394 U.S. 332, 340 (1969) (in class actions, court looks only to the citizenship of the named representatives of the class). While in the past it was difficult to convince a federal court to certify a mass tort class, see *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976), such classes have been certified in the context of toxic torts, see *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 723-28 (E.D.N.Y. 1983); Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401, 404-406 (E.D. Pa. 1976).

Defendants, in many cases, will frequently be able to remove cases to a federal court, 28 U.S.C. § 1441(a), (c) (1982). There will be occasions, however, when removal will be unavailable because a defendant is a citizen of the forum state, thus preventing litigants from arguing for application of a federal rule. See 28 U.S.C. § 1441(b) (1982) (removal proper only if none of the defendants is a citizen of the forum state). See infra note 65. This does not necessarily result in greater unfairness than when state law is applied. Suppose, for example, New York law is especially favorable to plaintiffs. The law of plaintiff's domicile, Ohio, is particularly unfavorable. The rational plaintiff will sue in New York, the defendant's domicile. The state court defendant would be no more prejudiced by application of a federal rule than by application of the New York rule. Other litigants should not be denied the opportunity to argue for a federal rule simply because removal is sometimes impossible.
choice of a court in State B that creates the equal administration problem. In the typical tort case, that may be the price of federalism. In multi-tort cases, however, the clash of state interests and the presence of important federal interests suggests a different result.

In analyzing *Erie*, the posture of the parties is critical. The case involved a suit in a New York federal court brought by a nonresident against a New York corporation. Thus, the plaintiff was in a position to seek a more favorable rule of law in a federal court. Had the plaintiff sued in state court, the action would have been unremovable, state law undoubtedly would have applied and the New York defendant would have been protected by New York choice of law principles. *Erie*, and its later extension to equity suits, prevented the nonresident plaintiff from seeking to foist an unfavorable federal rule of law on the resident defendant who otherwise would be protected by forum state law.

If, however, the parties' residencies are reversed, quite different considerations would come into play. If a resident plaintiff sues a nonresident defendant in state court, the action is removable. Thus, before *Erie*, the nonresident defendant could avoid unfavorable forum state law by removing to a federal court, which would apply federal general common law. In no sense, then, could there be "discrimination" by virtue of applying a federal rule. Ironically, applying *Erie* in this situation perpetuates discrimination against nonresident defendants, because they will be unable to argue for applying a federal rule rather than unfavorable forum law. That result seems contrary to the spirit of *Erie*.

In addition, *Erie* does not prevent a plaintiff from finding another state in which the defendant would be subject to personal jurisdiction and in which an unfavorable state rule would be applied. This forum shopping also deprives defendants of the favorable law that would have been applied by the state in which they reside. *Erie* could not prevent that, despite the apparent unfairness. Furthermore, plaintiffs now can sue most corporate defendants in a state or federal forum in plaintiffs' home states.

---

64. *Erie*, 304 U.S. at 69.
65. 28 U.S.C. § 1441(b) (1982) provides:
Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Id. Thus, the defendants in *Erie* and *Guaranty Trust* would not have been entitled to remove their actions.
66. In *Erie*, the defendant would be protected by New York law because under the vested rights choice of law approach used at the time, see *supra* note 56, the New York courts would have chosen to apply Pennsylvania law, the law of the place where the tort occurred. Similarly in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the New York defendant would have been protected by application of the forum (New York) statute of limitations.
68. See *supra* note 66.
assuming there is personal jurisdiction over the corporate defendant and that the parties are diverse. If the state forum is chosen, the corporate defendant is generally free to remove the case because it is not a citizen of the state. Accordingly, there can be no choice of law prejudice to the defendant because it can freely choose to stay in state court or remove to federal court.

Similarly, no unfairness is inflicted on the plaintiff because the plaintiff's counsel should be aware that the case is removable. If the plaintiff believes state law favors its position and chooses defendants either to destroy diversity jurisdiction or to prevent removal, the defendant will be unable to seek application of federal common law. However, this is a necessary consequence of the federal courts' limited subject matter jurisdiction and does not result in the denial of a litigant's equal protection interests that concerned Justice Brandeis in \textit{Erie}. Thus, although some federal-state forum shopping might occur if federal common law is applied in mass tort cases, this is better than state-to-state forum shopping because, as Part III demonstrates, the federal interests in these cases are substantial, the harm occurs in many states, and predictability of result would be greater.

\textit{Erie} does not support the proposition that federal common law may not be applied in multi-tort cases, in which federal regulatory powers may be in issue. Moreover, even if \textit{Erie} required that state law be applied in multi-tort cases, Justice Brandeis' goal of equal administration of the laws would be thwarted. If Justice Brandeis' equal protection concern is valid, the Constitution must also require uniform rules in multi-tort

---

69. 28 U.S.C. § 1332(c) (1982) provides:

For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Id. (emphasis in original).

In addition, if the plaintiffs were injured in the state of their citizenship, the forum would probably have personal jurisdiction over the corporate defendant under the forum state's long arm statute. See, e.g., Conn. Gen. Stat. §§ 52-59b (West Supp. 1984-1985); N.Y. Civ. Prac. Law § 302 (McKinney 1972 & Supp. 1984-1985). Federal courts apply the personal jurisdiction law of the forum state in diversity cases. See Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1963).


72. See \textit{infra} notes 73-83 and accompanying text.

73. The fourteenth amendment equal protection clause, U.S. Const. amend. XIV, § 1, applies to the federal government. See \textit{Bolling v. Sharpe}, 347 U.S. 497, 500 (1954). Nevertheless, there has been much debate over whether the constitutional basis of the \textit{Erie} decision is supportable. Among the commentators who criticize the constitutional dis-
cases because applying one state's law would discriminate against the law of another state and against some parties in an action, and unreasona-


74. Hill I, supra note 25, at 454-55. Professor Hill has argued that the drafters of the Constitution did not intend the result in federal inferior courts to mirror the result that would be obtained in state courts. See id. at 454. He suggests that the privileges and immunities clause of the Constitution would not be violated when state choice of law decisions are resolved in favor of application of forum or some other law regardless of the citizenship of the parties in the litigation. See id. at 454-55. Take the previous example from note 66, supra, on whether the New York rule would apply. At the time Erie was decided, the lex loci delicti rule—the law of the place of the wrong—was uniformly applied in tort cases. See supra note 56. Therefore, all parties would know which state's law would apply. State-to-state forum shopping was impossible because the law of the state of the wrong would apply regardless of where the action was brought. Since the landmark case of Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), was decided, however, most states have used some form of interest analysis requiring the court to balance competing governmental policies when determining which state's law applies. See Scoles & Hay, supra note 56, at 565-70. The choice of law question will often depend on the citizenship of the parties. Id. This frequently leads to application of forum state law. See B. Currie, Notes on Methods and Objectives in the Conflict of Laws, in Selected Essays on Conflicts of Laws 183 (1963); Milhollin, The Forum Preference in Choice of Law: Some Notes on Hurtado v. Superior Court, 10 U.S.F.L. Rev. 625, 627-31 (1976); Sedler, Rules of Choice Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases, 44 Tenn. L. Rev. 975, 1032-41 (1977). In any event, use of modern choice of law methods leads to unpredictability. See Scoles & Hay, supra note 56, at 42-46. Because Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), requires a federal court to apply the choice of law rules of the forum state, id. at 496, obtaining “equal administration” of the laws accordingly becomes much less probable and encourages state-to-state forum shopping. See 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, 806-07 (1957) [hereinafter cited as Mishkin II]. In multi-tort cases, the courts are continuously confronted with novel twists on old problems such as causation and the accrual date of a cause of action. Thus, given the complexity of determining what the law of the state is, it defies logic to say that Erie precludes applying a federal rule because it would result in unequal administration of
bly burden interstate commerce.75

Even if the Erie rationale does not rise to a constitutional level, but rather is predicated on section 34,76 the result is the same. Section 34 requires state law to be applied “except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide.”77 When read with procedural statutes that permit consolidating related cases that were commenced in many districts,78 the statutes Congress passed that regulate the products and substances that give rise to toxic tort litigation79 provide the basis for applying federal law.80 Indeed, a close reading of the later refinements of Erie in Guaranty Trust Co. v. York,81 Byrd v. Blue Ridge Rural Electric Cooperative82 and Hanna v. Plumer,83 demonstrates that strict application of Erie is not warranted in multi-tort cases.

B. The Myth of the Substantive/Procedural Dichotomy: A Two Part Test for Determining the Meaning of “Substantive” for Erie Purposes

In Guaranty Trust Co. v. York,84 the Court confirmed that equal administration of the laws was the Erie doctrine’s primary purpose. The issues in Guaranty Trust were whether Erie and its interpretation of section 34 required applying state law in equity cases,85 and if so, whether a state statute of limitations—traditionally characterized as a procedural rule—must be applied.86 The Court answered both questions affirmatively, and in doing so adopted the “outcome determinative” test.87 But

---

75. See supra note 62.


78. See infra notes 308, 320-22, 338-49 and accompanying text.

79. See supra note 45.

80. See text accompanying infra notes 235-37.


84. 326 U.S. 99 (1945).

85. See id. at 101.

86. See id.

87. See id. at 109. In Guaranty Trust, the Court ruled that when a lawsuit is in federal court on the basis of diversity jurisdiction, the federal court adjudication should not lead to a substantially different result than if the lawsuit had been commenced in a state court. Id. Thus, if the application of the legal rule in issue would determine the outcome of the litigation, the state rule must be applied. Id. at 108-09. In Guaranty Trust, because the question of statute of limitations would significantly affect the outcome of the case, the state rule must be applied. Id. at 110. The test has been criticized because applied literally, almost any rule, including procedural rules, can be outcome deter-
the Court made several other observations far more important for purposes of this Article.

First, Justice Frankfurter noted that *Erie* concerns only arise in the case of "transactions for which rights and obligations are created by one of the States."88 Second, he recognized that the substance/procedure distinction89 does not determine what law should apply.90 Rather, *Erie* was meant to prevent the "accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away"91 from leading to a "substantially different result."92 Finally, he stated that federal courts may provide equitable remedies for substantive rights recognized by states despite a state's inability to provide that same remedy.93

In multi-tort cases, there is no "accident of a suit" "by a non-resident litigant" in a federal court rather than a state court.94 Instead, the choice of a federal forum stems from the plaintiff's view of which forum state's law will provide the best result.95 Moreover, because of the existence of relevant federal statutes and because of the multiple parties and many states involved, it cannot be argued that multi-tort cases involve only "rights and obligations . . . created by one of the States."96 Rather, because plaintiffs have suffered injury in many different states, and potential defendants' conduct caused harm in different states, various states may have an interest in a multi-tort case. Thus, the parties' rights and obligations may not readily be said to have been created by any one of these states. Therefore, it is unclear whether the issues in these cases are clearly "substantive" or "procedural" for *Erie* purposes.97 Significantly, the Court distinguished "the right" to sue from "the remedy" to be granted. This confirms that not all issues are necessarily governed by the same law.

Although *Byrd"*98 is perhaps the least understood and most confusing of *Erie* 's progeny, it seems to illuminate the meaning of "substantive" for *Erie* purposes by explaining why the *Guaranty Trust* Court noted that the substance/procedure dichotomy cannot always provide the answer to the question of what law should apply.99 In *Byrd*, a resident of South Carolina sued in federal court for injuries suffered while connecting

---

89. *Id.* at 108-09.
90. *See id.* at 109.
91. *Id.*
92. *Id.*
93. *See id.* at 106.
94. *See infra* notes 308, 320-22, 338-49 and accompanying text.
95. *See supra* notes 60, 63 and accompanying text.
97. *Id.* at 109.
power lines for the defendant electric power company. The court of appeals reversed a judgment against the defendant because, in the court’s view, the plaintiff was a statutory employee whose only remedy was under South Carolina’s Worker Compensation Act. The Supreme Court remanded the case to the trial court to provide the plaintiff with an opportunity to present evidence on the statutory employee issue. In addition, the Court held that on remand, pursuant to federal policy, the facts pertaining to the statutory employee issue were to be decided by a jury, rather than by the judge, as was required by South Carolina law.

Writing for the majority, Justice Brennan conceded that had the jury issue been “bound up [with] the rights and obligations of the parties” under South Carolina law, state law would have governed the issue. The Court failed to establish a concrete test for determining when an issue was “bound up [with] the rights and obligations of the parties.” Justice Brennan’s opinion, however, noted that when the issue presented was not within that class, the federal courts must evaluate “countervailing considerations” that may favor applying a federal rule over the otherwise applicable state rules because the federal courts are an “independent system for administering justice to litigants who properly invoke its jurisdiction.”

The Byrd Court, like the Guaranty Trust Court, was concerned with only one state’s rule. In Byrd, the Court concluded that the rule in issue, unlike the statute of limitations issue present in Guaranty Trust, served no significant policy of any particular state. Accordingly, the rule was not “intended to be bound up with the definition of the rights and obligations of the parties.” Therefore, under the Byrd approach,

100. See Byrd, 356 U.S. at 526-27.
102. See Byrd, 356 U.S. at 532-33.
103. See id. at 532-34.
104. Id. at 536.
105. See id.
106. See id. at 535-36.
107. Id. at 537.
110. The only state law considered by the Court in Byrd was that of South Carolina. See Byrd, 356 U.S. at 527. The Guaranty Trust Court was concerned only with New York law. See Guaranty Trust, 326 U.S. at 101.
111. 326 U.S. at 101.
113. Id.
the first question in multi-tort cases is whether a particular state rule to be applied by a court to a particular issue invokes a particular state's policy interests. When a court finds that a rule does not serve a significant policy of a particular state or that the significant policies of a number of states are implicated, Byrd suggests that the rule is not "intended to be bound up with the definition of the rights and obligations of the parties." 114 With plaintiffs and defendants from several states present in multi-tort cases, the potentially applicable rules may serve conflicting state policies. Although each state's policy interests may be important, the parties' rights and obligations in multi-tort cases cannot be said to derive, in a vested rights sense, from a particular state's rule.

The fact that there are competing state interests, even significant interests, which must be resolved is in itself a countervailing consideration calling for federal courts to consider applying a federal rule. Byrd suggests that in its choice of law analysis a federal court should examine countervailing federal considerations as embodied in the federal regulatory statutes.

In multi-tort cases, the federal courts should be permitted to weigh the federal interests implicated to ensure that applying one state's rule will not disrupt the federal system or thwart the policies of another state. 115 This approach is consistent with Byrd because there the federal policy supported by the "influence—if not the command—of the Seventh Amendment" 116 outweighed the "policy of uniform enforcement of state-created rights and obligations." 117 Byrd thus provides the first step in determining whether the federal courts should create and apply federal common law to all or some of these issues. The next question is whether the purposes of the Erie doctrine would be undermined if a federal court applies a federal rule different from one the forum state would have applied. This analysis was undertaken by the Court in Hanna v. Plumer. 118

The narrow question presented in Hanna was whether service of process in a federal diversity action is governed by Rule 4 of the Federal Rules of Civil Procedure or by the applicable state rule. 119 In holding that the federal rule applied, 120 the Court refused to enmesh itself in either the substantive/procedural dichotomy or the amorphous outcome determinative test. 121 Instead, Chief Justice Warren, writing for the Court, stated that the "twin aims" of Erie—discouraging forum shop-

114. Id.
115. Id. at 537. See infra notes 304-09 and accompanying text.
116. Byrd, 356 U.S. at 537 (citation omitted).
117. Id. at 537-38 (footnote omitted).
119. See Hanna, 380 U.S. at 461.
120. See id. at 463-64.
121. See id. at 465-67.
ping and avoiding inequitable administration of the laws—must be the reference point in determining whether state law should be applied. This interpretation of *Erie* shows that in multi-tort cases, application of a federal rule would discourage state-to-state forum shopping and also would avoid the equal protection concern raised by Justice Brandeis.

As the commentators have noted and *Hanna* itself makes clear, *Hanna* does not support the general proposition that a state's substantive law may be displaced by federal common law. Rather, the presumption is that when a state-created right is presented to a federal court for adjudication, state law applies to every substantive issue in the case. This assures that state interests are protected in the federal system. As demonstrated in the discussion of *Byrd*, however, it can be argued that in multi-tort cases, it makes no sense to talk about "substance" and "procedure" because the state interests compete or are inchoate. Indeed, in *Hanna* the Court observed that there will be issues difficult to characterize as substantive or procedural. The Court stated:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Moreover, *Hanna* suggests that *Erie* permits Congress and federal courts to consider whether to fashion federal rules of decision for federal courts when the rules are "supported by a grant of federal authority contained in Article I or some other section of the Constitution." Various procedural devices are available and should be used in multi-tort cases. The availability of these procedural rules invokes the command from *Hanna* that the power to make such rules also includes the power to regulate the range of issues that defy characterization as procedural or substantive and that obviously were not directly controlled by an act of Congress. The availability of a procedural rule permits

---

122. Id. at 468.
123. See id.
124. See *supra* notes 27-80 and accompanying text.
128. *Id.* (emphasis added).
129. *Id.* at 471.
130. *See id.* at 472. *See supra* notes 96-97, 112-17, *infra* notes 247-50, and accompanying text.
courts in multi-tort cases to engage in the two part test proposed in this section. It allows a federal court to first determine whether the various state interests presented cancel each other out such that the federal court is free to consider federal interests. Second, it requires the court to determine whether applying a federal rule would undermine the "twin aims" of Erie.

The next Part turns to the question of whether multi-tort cases, like other cases in which federal common law has been applied, implicate important federal concerns that justify creating federal rules to vindicate the discernible federal interests in the absence of explicit governing federal legislation.

II. THE NEW FEDERAL COMMON LAW

A. The Meaning of Federal Common Law

On the same day Justice Brandeis announced in Erie that "[t]here is no federal general common law," he also declared in Hinderlider v. La Plata River & Cherry Creek Ditch Co. that federal common law applied to the apportionment of waters of an interstate stream. What Justice Brandeis ignored and many commentators have similarly failed to consider is that Erie and its progeny and the federal common law line of cases are two sides of the same coin. On the Erie side, federalism dominates; on the other, the supremacy of federal interest dominates.

Knowing that federal common law exists does not define the concept. What, then, is federal common law? Federal common law is simply 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.

131. 304 U.S. 64, 78 (1938).
132. 304 U.S. 92 (1938).
133. See id. at 110. The Court also acknowledged that controversies concerning state boundary disputes were governed by federal common law. See id.
134. But see Merrill, supra note 22, at 12-13.
135. Some commentators refer to the rules as "National Common Law." See Cheatham, Comments by Elliott Cheatham on the True National Common Law, 18 Am. U.L. Rev. 372, 374 (1969); Keeffe, supra note 19, at 316. Professor Cheatham abhors use of the term federal common law, which might refer to rules that are binding on the states under the supremacy clause, see infra note 209, or which might also refer to the federal court's independent determination of what state law is. See id. at 327-29; Swift v. Tyson Exhumed, supra note 19, at 294-97. Other commentators view the meaning of federal common law broadly. For instance, Professor Merrill defines federal common law as "any federal rule of decision that is not mandated on the face of some authoritative federal text." Merrill, supra note 22, at 5 (emphasis in original). Thus, federal common law would include constitutional lawmaking or "non-originalist" judicial review, cases involving implied rights of action, and ordinary statutory construction. Id. at 7. He also argues that federal common law, as a law of the United States, is binding on the states. Id. at 7. This Article focuses on the kind of federal common law that Professor Merrill might justify as "preemptive lawmaking." Id. at 3, 48-53. However, the Article argues
Factors relevant in the development of these rules include the subject matter jurisdiction basis for the lawsuit, the presence and strength of state interests, the interstate nature of the controversy, the presence of a federal party, the strength of the federal interest, the existence of relevant federal constitutional, treaty, or statutory law, and finally, expediency. The interaction of these factors in multi-tort cases makes applying federal common law appropriate and permissible because a court's power to create a federal rule of decision derives from either a federal policy or text.

B. The Birth of the New Federal Common Law

In the years immediately following Erie and Hinderlider, federal common law was applied in a variety of cases. The gestation period of the federal common law terminated in 1943 when the Court decided Clearfield Trust Co. v. United States. In that case, the Court predicated creation of the new federal common law on the principle that when sufficient federal interests exist, a federal court is free to fashion a federal rule of decision to apply to particular issues in a case.

that federal common law rules created in multi-tort cases need not be given binding effect. See infra note 209.


142. Indeed, the Supreme Court has recognized the expedience factor. See City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) ("[f]ederal common law is a 'necessary expedient'"). In addition, Judge Friendly has alluded to expedience as a factor. See Friendly I, supra note 25, at 387 n.23. Judge Friendly stated that when the Court perceives a need, it will permit the creation of a federal common law to protect the federal interest when Congress has failed to provide an express rule. See id. at 413. See infra notes 219-20 and accompanying text.

143. See, e.g., Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715 (1945) (federal common law applied to question of whether interest was recoverable on claim under Fair Labor Standards Act); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455-56 (1942) (federal common law applied in an action by Federal Deposit Insurance Corporation on note transferred by a state bank as collateral); Royal Indemnification Co. v. United States, 313 U.S. 289, 296 (1941) (federal common law applied to question of interest on surety bond to stay enforcement of federal tax assessment); Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940) (federal common law applied to determine whether a director or a national bank was stopped from defending on the basis of illegality when a receiver sued him on a note); Board of County Comm'r's v. United States, 308 U.S. 343, 352 (1939) (federal common law applied in suit by United States to recover taxes illegally collected by a state from an Indian ward).

144. 318 U.S. 363 (1943).

145. See id. at 366-67.
Three cases since Clearfield Trust—Textile Workers Union v. Lincoln Mills,146 Banco Nacional de Cuba v. Sabbatino,147 and Illinois v. City of Milwaukee148—represent the doctrine’s maturation. In these cases the Court revealed that two factors are central to whether federal common law can be created: whether some peculiar or unique federal interest is involved149 and whether Congress implicitly intended that the court’s interstitial or common law lawmaking function be exercised.150

1. Clearfield Trust Co. v. United States—The Role of Federal Interests

In Clearfield Trust Co. v. United States151 the federal government sued a bank to recover for the payment of a forged United States Treasury check that the bank had innocently cashed.152 The issue was whether state law or federal common law should apply to the bank’s argument that the government’s delay in providing it with notice of the forgery prevented the government’s recovery.153 The Court began by observing that Erie did not apply because federal law applies to issues of the federal government’s rights and obligations on commercial paper it issues.154

In its analysis, the Court noted that the issuance of commercial paper by the United States was vast and that transactions involving that paper frequently occurred in several states.155 In addition, the Court feared that applying state law or federal common law should apply to the bank’s argument that the government’s delay in providing it with notice of the forgery prevented the government’s recovery.153 The Court began by observing that Erie did not apply because federal law applies to issues of the federal government’s rights and obligations on commercial paper it issues.154

Accordingly, the Court stated that a uniform rule was desirable and observed that the federal law merchant that had developed under the regime of Swift v. Tyson could serve “as a convenient source of reference for fashioning federal rules applicable to these federal questions.”157 A uniform federal rule was needed to protect those rights of the United States that found their

146. 353 U.S. 448 (1957).
150. See Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957). Professor Hill, for example, argues that “federal courts have, in general, the same creative function and the same range of remedial authority as do state courts in their different spheres of competence.” Hill II, supra note 48, at 1025. The thesis of this Article is that the federal courts have competence to create common law rules in the area of multi-tort litigation based on the implicit command of various federal procedural and regulatory statutes. See supra notes 48-50 and accompanying text.
151. 318 U.S. 363 (1943).
152. See id. at 364-66.
153. See id. at 366.
154. See id.
155. Id. at 367.
156. Id.
157. Id. at 367.
"roots" in federal constitutional and statutory sources. As a result, the federal courts had implicit authority to create legal rules to vindicate those rights.\textsuperscript{158}

2. \textit{Textile Workers v. Lincoln Mills}—The Role of Congressional Intent

In two ways, the Court in \textit{Textile Workers v. Lincoln Mills},\textsuperscript{159} further developed the idea articulated in \textit{Clearfield Trust}\textsuperscript{160} that federal common law may be applied when federal rights stem from federal sources of law. First, \textit{Clearfield Trust}'s approach was extended to a case involving only private parties.\textsuperscript{161} Second, the role of congressional intent emerged as an explicit factor in determining whether a federal rule of law should be created and applied.\textsuperscript{162}

As in \textit{Clearfield Trust}, state law created the plaintiff's cause of action.\textsuperscript{163} A collective bargaining agreement between a union and an employer provided that there would be no strike or work stoppages, and that the last step in a grievance procedure was to be arbitration.\textsuperscript{164} After the employer refused to arbitrate, the union sued in federal district court to compel arbitration.\textsuperscript{165} The issue before the Court concerned the constitutionality of section 301(a) of the Labor Management Relations Act of 1947\textsuperscript{166} which provided that federal district courts had subject matter jurisdiction over suits for violations of collective bargaining agreements without regard to the citizenship of the parties.\textsuperscript{167} The employer argued that the action before the Court was simply a state cause of action for

\textsuperscript{158} Id. at 366. The Court listed a number of federal sources for the right at issue including the Constitution, because issuing a check is an exercise of a constitutional function of power, \textit{see id.}, various Treasury Regulations, \textit{see id.} at 366 n.2, and a federal criminal statute that bore on the issue of a forged endorsement, \textit{see id.} The need for uniformity in \textit{Clearfield Trust}, 318 U.S. 363 (1943), was no more plain than it is in a mass tort case. Moreover, Justice Douglas did not articulate in \textit{Clearfield Trust} a cogent reason why the uncertainty created by applying different state rules to federal government obligations is any more compelling than in a private case. Thus, it is at least arguable that the need for uniformity stemmed more from a desire to protect a federal right than from the fact of uncertainty. \textit{See id.} at 367.

\textsuperscript{159} 353 U.S. 448 (1957).
\textsuperscript{160} \textit{Clearfield Trust Co. v. United States}, 318 U.S. 363 (1943).
\textsuperscript{161} \textit{See Lincoln Mills}, 353 U.S. at 450-51. \textit{See infra} note 271.
\textsuperscript{162} \textit{See id.} at 457.
\textsuperscript{163} \textit{Id.} at 469-70 (Frankfurter, J., dissenting).
\textsuperscript{164} \textit{See id.} at 449.
\textsuperscript{165} \textit{See id.}
\textsuperscript{166} \textit{See 29 U.S.C. § 185(a)} (1982).
\textsuperscript{167} \textit{See Lincoln Mills}, 353 U.S. at 449-50. The statute states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

breach of contract because the Act did not explicitly set forth the rights and duties of parties under collective bargaining agreements.\textsuperscript{168} Thus, because there was no Article III\textsuperscript{169} basis such as a federal question inherent in section 301(a), the federal courts lacked subject matter jurisdiction.\textsuperscript{170}

The plurality opinion, written by Justice Douglas, solved the problem by reading section 301(a) to include not only the jurisdictional grant,\textsuperscript{171} but also an authorization to "the federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."\textsuperscript{172} The parties' rights and obligations would then be governed by this emerging body of judge-made law. Accordingly, the jurisdictional grant of section 301(a) was constitutional because the case arose under federal law.\textsuperscript{173}

Conceding that the legislative history on whether Congress intended to authorize the creation of federal judge-made law was "somewhat cloudy and confusing,"\textsuperscript{174} Justice Douglas looked to "a few shafts of light that illuminate[d] the problem."\textsuperscript{175} Under this judicial lamp, he found that section 301(a) "express[ed] a federal policy that federal courts should enforce these agreements"\textsuperscript{176} and that "the substantive law to apply [was] a federal law, which the courts must fashion from the policy of our national labor laws."\textsuperscript{177} Although the obvious place to look for substantive law in this case would be the Labor Management Relations Act, which expressly provided some substantive law, Justice Douglas recognized that other cases could prove more difficult:

Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . It is not uncommon for federal courts to fashion federal law where federal rights are concerned.\textsuperscript{178}

Thus, the \textit{Lincoln Mills} Court recognized that even in disputes be-

\begin{itemize}
\item \footnotesize{168. \textit{See Lincoln Mills}, 353 U.S. at 468-69 (Frankfurter, J., dissenting).}
\item \footnotesize{169. Article III provides that the federal court's judicial power extends to cases "arising under this Constitution, the Laws of the United States, and Treaties." \textit{U.S. Const. art. III, § 2.}}
\item \footnotesize{170. \textit{See Lincoln Mills}, 353 U.S. at 469-70 (Frankfurter, J., dissenting).}
\item \footnotesize{171. \textit{See id.} at 451.}
\item \footnotesize{172. \textit{Id.} at 451.}
\item \footnotesize{173. \textit{See id.} at 457. Because Congress used the power to regulate labor-management relations under the commerce clause of the Constitution, \textit{U.S. Const. art. I, § 8, cl. 3}, the case was within the purview of judicial power as defined in Article III. \textit{See Lincoln Mills}, 353 U.S. at 457.}
\item \footnotesize{174. \textit{Lincoln Mills}, 353 U.S. at 452.}
\item \footnotesize{175. \textit{Id.}}
\item \footnotesize{176. \textit{Id.} at 455.}
\item \footnotesize{177. \textit{Id.} at 456.}
\end{itemize}
between private parties, a federal court has the authority and power to create federal rules based on federal rights derived from even an ambiguous "penumbra of express statutory mandates." According to Justice Douglas, the federal rights and policies involved were so strong and the legislative intent sufficiently clear, that both the rule of decision and subject matter jurisdiction were provided. Even when federal rights and policies are less directly implicated, if an alternative basis for asserting subject matter jurisdiction already exists, federal judge-made law may be applied in private disputes.

For example, *Sola Electric Co. v. Jefferson Electric Co.* involved a private dispute regarding the validity of a patent. The patentees sued a licensee for unpaid royalties in federal court based on diversity. The question was whether the invalidity of the patent estopped the patent licensee from challenging a price-fixing clause in the licensing agreement. The court of appeals had dismissed the licensee's counterclaim because the licensee accepted a license under the patent, and was thereby estopped from denying its validity. The court cited neither state law nor federal law to support that conclusion. The Supreme Court stated, however, that the *Erie* doctrine did not control because the doctrine of estoppel invoked by the court of appeals conflicted with the Sherman Act's prohibitions against price-fixing. The Court noted:

It is familiar 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. . . . [In *Erie*] we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which 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.

Although *Sola* involved only a private dispute, the federal policies underlying the Sherman Act were so overwhelming that the Court did not discuss any state interests. Moreover, arguably the Court thought no

---

179. *Id.*
180. See *id.* at 455-56.
181. For example, a case may be properly before the Court under diversity jurisdiction. *See 28 U.S.C. § 1332 (1982).*
182. See *infra* note 271 and accompanying text.
184. *See id.* at 173.
185. *See id.* at 173-74.
186. *See id.* at 173.
188. *See id.*
191. *Id.* at 176.
192. *See id.* at 177.
other factors were necessary to support the creation of a federal rule on
the estoppel issue because a federal statute was the basis for a defense and
therefore was directly in issue in Sola. When federal statutes are not so
directly in issue, however, other reasons have been cited to justify creat-
ing a federal rule.¹⁹³

Thus Lincoln Mills and Sola both show that in cases involving private
parties, if important and identifiable federal interests are at stake that
have their roots in some explicit federal text, a federal court has the
power to create rules resolving the dispute. Although the right to sue in
these cases did not emanate from a federal statute, rights and interests
created by federal statutes provided implicit congressional authorization
and the basis for applying a federal rule of decision.

Interests

In Banco Nacional de Cuba v. Sabbatino¹⁹⁴ the presence of a “pecu-
liarly federal concern” justified creating federal common law even
though neither the United States nor a federal officer was a party.¹⁹⁵ The
parties in Sabbatino were Banco Nacional—an instrument of the Cuban
government—and a United States commodity broker.¹⁹⁶ The broker had
contracted to buy sugar from an American-owned Cuban company.¹⁹⁷
Subsequently, the Cuban government expropriated the Cuban corpora-
tion’s property and rights.¹⁹⁸ Banco Nacional sought to recover payment
from the broker for the sugar.¹⁹⁹ The issue was whether the broker’s
defense that the expropriation was illegal was defeated by the act of state
doctrine,²⁰⁰ which prohibits the judiciary of one country from inquiring
into public acts committed within its own borders by a recognized for-

¹⁹³. For example, in Howard v. Lyons, 360 U.S. 593 (1959), a diversity case involving
a claim for defamation against a federal official, the Court said that federal law applied to
the defense of absolute privilege. See id. at 597. Justice Harlan noted that because a
federal officer’s authority to act derived from federal sources, see id., and because a privi-
lege for statements made during the course of duty was related to the effective functioning
of the federal government, the issue was one of “peculiarly federal concern.” Id. (citing
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)). In addition, because Con-
gress had enacted no statute on the issue, the “claim of absolute privilege [had to] be
judged by federal standards, to be formulated by the courts.” Id.


¹⁹⁵. See id. at 426.

¹⁹⁶. See id. at 401-07. Although the complaint had alleged both diversity and federal
question jurisdiction, the court of appeals, decision rested only on diversity jurisdiction.
See Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 852 (2d Cir. 1962), rev’d, 376
U.S. 398 (1964). The Supreme Court decided the case similarly. See Sabbatino, 376 U.S.
at 421 n.20.

¹⁹⁷. See Sabbatino, 376 U.S. at 401.

¹⁹⁸. See id. at 403.

¹⁹⁹. See id. at 405-06.

²⁰⁰. Id. at 415.

The first question was whether state or federal law applies in a federal diversity case. The Court's answer was unequivocal: [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie R. Co. v. Tompkins.

Indeed, according to the Court, the problems raised by the act of state doctrine are as intrinsically federal as those present in water apportionment and boundary disputes. The Court also noted that authority to create federal rules in those cases stemmed from federal statutes reflecting a "concern for uniformity," the Constitution and the issues' "intrinsically federal" nature. Thus, Sabbatino shows that a combination of an intrinsically federal problem, and an implicit congressional authorization derived from constitutional or statutory provisions, will support the creation of a federal rule of law applicable in both state and federal courts.

The issues raised in toxic tort cases create serious problems that Congress has regulated under its commerce clause authority. Multi-tort litigation arguably may not be as significant or as "intrinsically federal" in the hierarchy of federal interests as the act of state doctrine, and does not present the same intrinsically federal questions as those dealing with \( \text{supra} \) note 44 and accompanying text. Judge Friendly has suggested that multistate cases such as mass accidents and defamation suits are likely candidates for federal common law. See Friendly I, supra note 26, at 117-19.


203. Id. at 425. When the Sabbatino Court spoke in terms of whether the Erie Court had rules such as the act of state doctrine in mind, it was thereby suggesting that Erie was more a statement of the principle of federalism than an exposition of the Rules of Decision Act. Impliably, therefore, the federal courts have the power to determine whether federal interests predominate over the principle of federalism to justify a departure from state law. The Second Circuit has enunciated a similar principle: "Likewise, the Erie doctrine is inapplicable to claims or issues created or governed by federal law, even if the jurisdiction of the federal courts rests on diversity of citizenship." Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n.1 (2d Cir. 1956).

204. Id. at 427. The Court did not discuss why foreign relations questions are as "intrinsically federal" as water apportionment or boundary disputes. It appears that the answer lies in the constitutional plan. In some areas, the needs for uniformity and for the federal sovereign to deal with a particular problem are obvious. Foreign relations and interstate conflicts are such problems.

205. See id. at 427 n.25. In other cases, such as border dispute cases, judicial authority existed by virtue of their "intrinsically federal" nature.

206. See id. at 426-27.

207. See supra note 44 and accompanying text. Judge Friendly has suggested that multistate cases such as mass accidents and defamation suits are likely candidates for federal common law. See Friendly I, supra note 26, at 117-19.

208. Sabbatino, 376 U.S. at 423.
with a foreign sovereign. This does not mean that a federal rule cannot be adopted. Rather, it is proposed that when a multi-tort case is presented to a federal court for adjudication, the federal court has the power to implement the policies underlying federal texts by choosing to apply a federal rule rather than a state rule. The federal court is thus transforming what is essentially a vertical choice of law problem into a horizontal choice. The supremacy of federal interests requires that a federal rule be applied in that case only. Assuming federal interests are

209. The Court has explicitly recognized that cases involving an interstate conflict may compel such a result. See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). In Hinderlider, a state boundary case, the issue was apportionment of the waters of an interstate stream. Id. at 95. The dispute was not directly between two states, which would have given the Supreme Court jurisdiction to resolve the controversy, but rather between a state official and a private company. The Constitution grants the Supreme Court original jurisdiction "[i]n all Cases... in which a State shall be a Party." U.S. Const. art. III, § 2, cl. 2. Congress has executed that power by providing that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a) (1982). See Hinderlider, 304 U.S. at 95, 109.

The company argued that the state official's action of diverting water to meet the state's obligation pursuant to an interstate compact violated the due process clause contained in the fifth and fourteenth amendments. See id. at 99. The official asserted the compact, which was entered into with the consent of Congress, as a defense. See id. at 95. Because the controversy involved apportionment of water of an interstate stream under the terms of an interstate compact, there was a "federal question." Id. at 110.

Accordingly, without further explanation, the Court granted certiorari to review the state court's determination, because the result of the state court's decision was to deny "an important claim under the Constitution." Id. The Court stated:

whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. . . . Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.

Id. (citations omitted). In addition, the Court said that even if the dispute had been between private parties, the result would have been the same. See id. at 110-11.

The orthodox view is that federal common law, because it is federal law, is binding on the states. See Free v. Bland, 369 U.S. 663, 666 (1962); U.S. Const. art. VI, cl. 2; Merrill, supra note 22, at 6-7; see also Hill II, supra note 48, at 1073-79 (supremacy clause requires that federal common law be binding on the states). This Article concludes that federal courts adjudicating multi-tort cases should be able to choose to apply federal common law as a matter of a choice of law analysis. Thus, when this Article refers to federal common law, it does not necessarily refer to binding federal rules. If, however, a court finds that such strong federal interests exist that the case can be said to arise under federal common law, giving the court federal subject matter jurisdiction, such law should be binding on the states as well.

Under the analysis in this Article, applying federal common law in multi-tort cases will not always displace state law. Mass tort cases usually do not arise under federal common law. See infra notes 263-78 and accompanying text. They are diversity cases in which the plaintiffs are bringing essentially state law causes of action for their personal injuries or property damage. If litigants choose to remain in state court, the state court should be free to apply whatever jurisdiction's law is appropriate. If, however, litigants choose federal court, and the case becomes a multi-tort case by virtue of a § 1407 transfer, see infra notes 309, 320-22, 338-49 and accompanying text, the federal court may exercise independent judgment on what law should apply and may indeed choose a federal rule of decision.
demonstrated by the enactment of a federal statute regulating the product or substance, a conflict among the interests of numerous states concerning the product or substance presents an intrinsically federal problem to which a federal rule may apply when the litigation is conducted in federal court.

4. Illinois v. City of Milwaukee—Expedience and Interstate Harm

Illinois v. City of Milwaukee\(^{210}\) involved the Supreme Court's original jurisdiction over controversies between two or more states.\(^{211}\) Illinois brought a public nuisance cause of action against various Wisconsin governmental entities, seeking an order requiring the defendants to stop dumping pollutants into Lake Michigan, an interstate water.\(^{212}\)

The Court first addressed the question of whether the dispute before it was within the subject matter jurisdiction of the federal district court. Significantly, the Court held that the case arose under the "laws" of the United States because the word "laws" "embraced claims founded on federal common law."\(^{213}\)

In a unanimous opinion written by Justice Douglas, the Court found that general federal environmental and pollution statutes evidenced Congress' concern for protecting the responsibility and right of the states to regulate matters such as those in City of Milwaukee.\(^{214}\) However, the Court also observed that Congress made clear that federal law controlled in cases involving interstate waters.\(^{215}\) Despite its recognition that the remedy sought by Illinois was "not within the precise scope of remedies prescribed by Congress," the Court declared that "the remedies which Congress provides are not necessarily the only federal remedies available. It is not uncommon for federal courts to fashion federal law where fed-

---

\(^{210}\) 406 U.S. 91 (1972).

\(^{211}\) See id. at 93. The Supreme Court has original jurisdiction to decide controversies between two or more states under 28 U.S.C. § 1251(a) (1982). However, the Court held that because Milwaukee was a political subdivision, and not a "State," see Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972), jurisdiction could not lie under § 1251(a). See 28 U.S.C. § 1251(a) (1982). See infra note 223. Jurisdiction would be proper under § 1251(b)(3), however, because a political subdivision is a citizen of the state, see Bullard v. City of Cisco, 290 U.S. 179, 187 (1933), and the Supreme Court has original jurisdiction over actions between a state and citizen of another state, see 28 U.S.C. 1251(b)(3) (1982). This distinction is critical because it shows that the multistate aspect of the case was not derived from the fact of a state-state conflict, but rather from a conflict between only one sovereign and the citizens of another state. Multi-tort cases, to the extent that applying one sovereign's law operates to deprive citizens of another state of a right, are thus analogous to City of Milwaukee.

\(^{212}\) City of Milwaukee, 406 U.S. at 93.

\(^{213}\) Id. at 99 ("Federal courts have an extensive responsibility of fashioning rules of substantive law.... These rules are as fully 'laws' of the United States as if they had been enacted by Congress.") (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 393 (1959) (Brennan, J., concurring in part and dissenting in part)). But see supra note 29.

\(^{214}\) See City of Milwaukee, 406 U.S. at 101-03.

\(^{215}\) See id. at 102.

\(^{216}\) Id. at 103.
eral rights are concerned.'”

City of Milwaukee exemplifies the expediency factor because the interstate nature of the conflict, together with the implied right to provide a remedy when federal statutes give rise to federal rights, and not the nature of the parties, caused the Court to decide that the case before it “arose under federal common law.” Indeed, the Court recognized that “only a federal common law basis can provide an adequate means” for solving these kinds of problems. Although the Court in City of Milwaukee recognized that a peculiar federal problem may eventually lead the legislative branch to “pre-empt” the area, it stated that until Congress acted explicitly, the federal courts had the power to create the applicable legal rules in what otherwise would have been merely a state law nuisance case.

The Court has not hesitated to declare a need for a federal rule not expressly granted in the Constitution or a federal statute in order to solve a unique problem when sufficient federal interests exist. Part III develop-

217. Id. (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957)).
218. Id. at 105 n.6.
219. Id. at 107 n.9 (quoting Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971)).
221. Id. at 107. Indeed, the Court’s prophecy came true. Five months after the Court’s decision, Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1982)). In 1981, the Court held that the amendment, which totally rewrote and restructured the Act, was a comprehensive regulatory program that preempted the area and precluded application of federal common law. See City of Milwaukee v. Illinois, 451 U.S. 304, 317-19 (1981). A similar regulatory program could be developed in the area of multi-torts. See infra notes 349-54 and accompanying text.

These decisions, however, do not foreclose application of federal common law in multi-tort cases. In both cases, Congress had enacted comprehensive statutes that provided the plaintiff’s cause of action and express remedies. Given the degree of detail, it would be difficult to argue that Congress forgot to include a specific provision such as a right of contribution among defendants. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979) (given the degree of specificity in the federal act, Court refused to find that Congress forgot to enact a provision enabling private individuals to sue for damages). Indeed, City of Milwaukee teaches that once Congress speaks explicitly, the opportunity for “an unusual exercise of lawmaking by federal courts disappears.” 451 U.S. at 314. There is still room for the federal courts to exercise their interstitial lawmaking functions in the case of multi-torts. Not until Congress passes a comprehensive federal products liability and toxic tort act providing individuals with a right to sue in federal courts for personal injuries will the federal court’s power to create federal common law cease. See infra note 351 and accompanying text.
ops an analytic framework for determining when federal common law should be created and applied to displace state law in multi-tort cases.

III. AN ANALYTIC FRAMEWORK FOR APPLYING FEDERAL COMMON LAW IN MULTI-TORT CASES

A. A Choice of Law Approach to the Problem

One should separate the following issues: what jurisdiction provides or creates the cause of action and right to sue; what jurisdiction provides or fashions the standards of conduct; and what jurisdiction determines the available remedies. Indeed, Guaranty Trust Co. v. York223 clearly distinguishes between the right to sue and the remedy.224 Clearfield Trust225 shows that the jurisdiction providing the right to sue may be different226 from the one providing the applicable legal standards.227

224. See id. at 105-06; see also Al Bishop Agency, Inc. v. Lithonia-Division of Nat'l Serv. Indus., Inc., 474 F. Supp. 828, 835 (E.D. Wis. 1979) (court applied federal remedy despite explicit state rule).
225. 318 U.S. 363 (1943).
226. See id. at 365-67. State law provided the cause of action, federal law applied to the standard of conduct.

The key inquiry in implied right of action cases is whether Congress intended to provide private citizens with a right to sue for damages or other relief when Congress has failed to provide explicitly for such relief. See Middlesex County Sewerage Auth., 453 U.S. at 15. While the Court has been increasingly concerned with these cases, see id. at 24-25 (Stevens, J., concurring), it has recently deviated from its earlier path of generally finding an implied right to sue, id. at 24; see also D. Currie, supra note 51, at 457-60 (discussing recent Supreme Court hostility towards finding implied causes of action). Justice Stevens, concurring in Middlesex County, suggested that the reason for this is quite obvious: "The touchstone now is congressional intent. . . . Because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention, that touchstone will further restrict the availability of private remedies." Middlesex County Sewerage Auth., 453 U.S. at 25 (Stevens, J., concurring) (citations omitted). Accordingly, courts are unlikely to provide a federal remedy by finding that plaintiffs in multi-tort cases have an implied right of action under the federal regulatory statutes.

A conclusion that no private right of action exists, however, does not foreclose the court's authority to fashion federal common law. The questions are distinct.
It is axiomatic that in multi-tort cases the laws of the fifty states create the cause of action on which the plaintiffs sue. A much more significant and thorny question remains, however. How should a federal court decide whether to apply state or federal law to each of the issues raised in a multi-tort case?

As demonstrated in Part I, in multi-tort cases, questions such as burden of proof, defenses, remedies and statutes of limitations are neither strictly substantive nor procedural. Part I also showed that it is easy, but unwise, to fall into the quagmire of determining whether an issue is substantive or procedural in the multi-tort context. Thus, rather than characterizing the issue presented as substantive or procedural, the federal courts must be allowed to consider whether to develop and apply federal common law to these issues regardless of their labels in a choice of law analysis because a multi-tort case should be viewed as a hybrid.


229. There are relatively few rules that can be treated as purely substantive or procedural. As Hanna suggests, "[t]he line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'" Hanna, 380 U.S. at 471 (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945)); see also Weinstein, The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence, 69 Colum. L. Rev. 353, 364-67 (1969) (discussing difficulty in determining whether state evidence rules deal with substantive or procedural matters). Indeed, the words "substantive" and "procedural" are merely conclusory labels. See Note, The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine, 85 Yale L.J. 678, 703 (1976) ("The line separating 'substantive' and 'procedural' law has varied . . . because, in each problem area, a set of considerations appropriate to the particular context has determined at what point the line was drawn to divide legal rules into two groups. The results of the line-drawing have been summarized in expressions about substantive and procedural law.") (footnote omitted).

The legal context changes in mass toxic tort cases. In a case like Erie, in which only one state's policy is implicated, the appropriate standard of care clearly may be and traditionally has been labeled substantive. See Hanna, 380 U.S. at 472. In a multistate case, however, the conflicting state policies, together with the opportunity for a just resolution of the dispute, compel a federal court to consider whether the federal interests involved justify displacing the state rules. Thus, the issues should not be treated as substantive. See supra notes 96-97, 112-18 and accompanying text.


231. In Erie R.R. v. Tompkins, 304 U.S. 64, 80 (1938), Justice Brandeis wrote that the federal court in New York could not disregard Pennsylvania common law. He never explained why Pennsylvania and not New York law applied. Two alternative explanations are possible. Professor Hart opined that Justice Brandeis assumed that a federal
A plaintiff’s cause of action or right to sue for negligence, strict liability or breach of warranty may arise under state law. Yet, the federal court would rely on federal choice of law principles in determining what law applies. See Hart, supra note 73, at 514 n.84 (“In Erie itself, Justice Brandeis seemed to assume that a federal court should think for itself on conflicts problems.”). But, given the prevailing choice of law methodology—lex loci delicti—see supra note 56, the more probable explanation is that Pennsylvania law would apply in a tort case involving a Pennsylvania citizen injured in Pennsylvania. See Friendly I, supra note 25, at 401.

Three years after Erie, the Supreme Court held that in cases in which Erie applied, federal courts must apply the conflict of laws rule of the state in which the court sits. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). See supra note 17.

In Klaxon, a nonresident brought suit against a Delaware corporation in a Delaware federal court on a New York contract. See id. at 494-95. The Third Circuit had failed to examine Delaware law and held that a New York statute providing for interest should be applied, apparently because it deemed the New York rule to be the better rule. See id. at 495-96. Without a cogent explanation, the Supreme Court reversed and remanded for a determination of what law a Delaware state court would apply in such a case. See id. at 496-97. According to the Court, to do otherwise “would do violence to the principle of uniformity within a state, upon which the Tompkins decision is based. . . . It is not for the federal courts to thwart such local policies by enforcing an independent ‘general law’ of conflict of laws.” Id. at 496. On remand, the Third Circuit concluded that Delaware would apply the New York statute. See Stentor Elec. Mfg. Co. v. Klaxon Co., 125 F.2d 820, 825 (3d Cir.), cert. denied, 316 U.S. 685 (1942).

The Klaxon rule was reaffirmed ten years ago in a per curiam opinion. See Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam). Thus, in multi-tort cases brought in a federal court, or in any other diversity case, a federal court in New York, for example, may have “to determine what the New York courts would think the California [or any other interested state] courts would think on an issue about which neither has thought.” Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), vacated and remanded, 365 U.S. 293 (1961). Both the “unreality of the process,” C. Wright, supra note 50, at 369, and the unfairness that is created because the Klaxon rule perpetuates state-to-state forum shopping, have led many commentators to argue that federal courts should be free to develop their own choice of law rules, independent of the states, and that the Klaxon rule is not constitutionally compelled. See, e.g., Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 41-42 (1963); Hart, supra note 73, at 513-15 (1954); Hill I, supra note 25, at 455-56; Horowitz, Toward a Federal Common Law of Choice of Law, 14 UCLA L. Rev. 1191, 1193 (1967); Mishkin II, supra note 74, at 802-10; Trautman, The Relation Between American Choice of Law and Federal Common Law, 41 Law & Contemp. Probs. 105, 114 (Spring 1977). But see Cavers, The Changing Choice-of-Law Process and the Federal Courts, 28 Law & Contemp. Probs. 732, 737 (1963) [hereinafter cited as Cavers I]; Cavers, Special Memorandum on Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem, in ALI, Study of the Division of Jurisdictions between State and Federal Courts (Tent. Draft No. 1, 1963) [hereinafter cited as Cavers II].

Because of the interstate nature of harm presented in multi-tort cases, and because Congress has provided a procedural tool, 28 U.S.C. § 1407 (1982), to assist in the just resolution of these kinds of cases, see infra notes 309, 320-22, 338-49 and accompanying text, there is even less reason for a federal court to be constrained to apply the Klaxon rule. See Boner, Erie v. Tompkins: A Study in Judicial Precedent, 40 Tex. L. Rev. 509, 522 (1962); Cavers I, supra, at 745-47; Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1236 n.62 (1946); Weintraub I, supra note 26, at 253-56.

Griffin v. McCooch, 313 U.S. 498 (1941) is not to the contrary. In Griffin, the state choice of law rule applied even though some parties were joined pursuant to the Federal Interpleader Act, currently codified at 28 U.S.C. § 1335 (1982), and nationwide service of process was authorized by the Act, 28 U.S.C. § 2361 (1982). See Griffin, 313 U.S. at 503. Thus, assignees of a contract made in New York could be subject to whatever law Texas
courts are not without power to provide a remedy that may differ from one rendered by a state court.\textsuperscript{232} The myriad federal statutes regulating various hazardous products and substances\textsuperscript{233} together with the implied authority to create rules to "do justice" when cases are consolidated pursuant to section 1407,\textsuperscript{234} provide authority for a federal court to create a federal rule when competing state interests and identifiable federal interests are presented. If a federal court decides that uniquely federal interests\textsuperscript{235} are presented, and substantive state policies clash or are unclear, implied congressional authority for common law lawmaking exists, and the state policies must yield.\textsuperscript{236}


In the context of multi-tort cases, the commerce clause, the federal regulatory statutes, and the equal protection clause provide the basis for Congress and the federal courts to find sufficient federal interests to support application of federal law.\textsuperscript{237} Section 1407, a procedural rule, exists would apply even though the assignees could not have been subjected to Texas jurisdiction without the use of the Interpleader Act. \textit{See id.} at 506.

\textit{Griffin}, however, is distinguishable from a case in which there is a transfer of multi-tort cases pursuant to \$ 1407. The Multidistrict Litigation Panel decides which district court will conduct the litigation. 28 U.S.C. \$ 1407(a) (1982). In the case of interpleader, the plaintiffs determine which court will adjudicate the lawsuit. Moreover, allowing the federal court as a relatively dispassionate observer to balance the competing state interests, which are likely to cancel each other out, along with whatever federal interests are discernible from federal regulatory statutes, best ensures that \$ 1407 leads to the just results envisioned by Congress when it enacted the provision. \textit{See} H.R. Rep. No. 1130, 90th Cong., 2d Sess. 2, \textit{reprinted in} 1968 U.S. Code Cong. & Ad. News 1898, 1899. As in admiralty cases and boundary dispute cases, the interests of the respective states involved in a multi-tort case would be furthered if a uniform rule were considered by a disinterested decisionmaker. \textit{Cf} L. Tribe, \textit{supra} note 44, at 116 n.7 (states could not by themselves achieve uniform or objective law).

\textsuperscript{232} \textit{See}, e.g., Hill II, \textit{supra} note 48, at 1024, 1027 (1967) (remedial implications of a rule are distinct from substantive content of a rule); \textit{Federal Common Law, supra} note 126, at 1523 (distinguishing between right and remedy).

\textsuperscript{233} \textit{See supra} note 45.

\textsuperscript{234} \textit{See infra} notes 309, 320-22, 338-49 and accompanying text.

\textsuperscript{235} \textit{See supra} notes 194-209 and accompanying text.

\textsuperscript{236} \textit{See supra} notes 50-51, 128, 207-10 and accompanying text.

\textsuperscript{237} By its terms, the equal protection clause, U.S. Const. amend. XIV, \$ 1, does not apply to the federal government. The clause states:
\begin{quote}
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\end{quote}

\textit{Id.}

The Supreme Court, however, has held that the fifth amendment's due process clause, U.S. Const. amend. V, although not containing equal protection language, forbids unjustifiable discrimination. \textit{See} Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Indeed, [i]the "equal protection of the laws" is a more explicit safeguard of prohibited
to assist federal courts in expediting the fair adjudication of mass tort claims by providing for a transfer of related cases to one federal district court for pretrial purposes. The express command of Congress when it enacted section 1407 was that the statute be used to assure “the ‘just

unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. In addition, the Court has stated that “[our] approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.” Weinberger v. Wissenfeld, 420 U.S. 636, 638 n.2 (1975). See supra note 62.

238. Section 1407 provides in pertinent part:

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder is remanded.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party’s action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel’s order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel’s order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.


and efficient conduct' " of multidistrict proceedings.\(^{239}\)

The Court in \textit{Hanna v. Plumer} stated that Congress' power to enact procedural rules supports an implied power in the courts to regulate in the murky area that is found in the midst of the substantive/procedural continuum. As discussed in Part I, the issues in multi-tort cases lie in this range.\(^{240}\) Accordingly, the congressional mandate in enacting section 1407 can be satisfied only if federal courts can freely examine the federal policies underlying the relevant regulatory schemes to determine whether federal common law should be applied. By doing this, courts will ensure equal administration of the law with respect to the parties in mass tort litigation, and will also ensure that any federal policy embodied in the statute is not undermined.

Thus, while most courts have accepted without question the rule that requires that the transferee court apply the law the transferor court would have applied,\(^{241}\) it is not unlikely that Congress intended the transferee court to consider applying a uniform rule to expedite the disposition of the consolidated lawsuits.\(^{242}\)


\(^{240}\) See \textit{supra} notes 96-97, 112-17 and accompanying text.


\(^{242}\) Section 1407 contains no choice of law provision. This is probably because the statute was originally enacted to deal with the problems raised in a mass antitrust conspiracy case in which federal law clearly would apply. \textit{See} H.R. Rep. No. 1130, 90th Cong., 2d Sess. 2, \textit{reprinted in} 1968 U.S. Code Cong. & Ad. News 1898, 1899. Some courts have questioned whether it is appropriate to apply transferor state law in all § 1407 transfer cases. \textit{See, e.g., In re The Pittsburgh & L.E.R.R. Secs. and Antitrust Litig.}, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976). The Third Circuit stated:

\textit{All of these opinions assumed that the rule of \textit{Van Dusen v. Barrack} ... determines the interpretation of \textit{federal} law which the transferor district would apply. It is difficult to understand why this should be so since \textit{Van Dusen v. Barrack} involved conflicting \textit{state} wrongful death policies, while in theory at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.} \textit{Id. (emphasis in original). Accordingly, because of the federal interest in multi-tort cases, the transferee court should be free to develop and apply the federal rule without being}
A uniform federal rule should be considered by a court when federal regulatory schemes relate to the product that caused the harm. Indeed, if federal interests predominate and a federal rule is not adopted, enforcing divergent state standards of liability may undermine the salutary purposes of the federal acts.243 Moreover, a federal rule may be needed to vindicate the anti-bias purpose of diversity jurisdiction244 and to prevent the equivalent of the equal protection problems raised in Erie.245 Thus, in a case involving a product that has injured plaintiffs throughout the United States, a section 1407 transfer, together with interstate harm and a federal regulatory scheme, provides the basis for applying a federal common law rule.

Federal interests, as evidenced in regulatory statutes, are enhanced when procedural devices such as section 1407246 are used. Until this de-

---

243. Indeed, Professor Keeffe suggested that diversity jurisdiction was intended to give the federal courts freedom to choose the appropriate rule of law. See Keeffe, supra note 19, at 324 (citing The Federalist No. 80, at 588-90 (A. Hamilton) (J. Hamilton ed. 1875)). Moreover, to the extent that states do not mechanically apply their own precedent, Erie is inconsistent with the basic premise of diversity jurisdiction. See L. Tribe, supra note 44, at 117; Corbin, The Laws of the Several States, 50 Yale L.J. 762, 775-76 (1941); Hart, supra note 73, at 510; Hill I, supra note 25, at 454.

244. Cf Baxter, supra note 231, at 39 (legal doctrine, not just the greater likelihood of objectivity, was the element intended to distinguish federal from state courts); Ely, supra note 25, at 712-13 (creation of an unbiased tribunal was primary aim of diversity jurisdiction). See supra notes 52-74 and accompanying text for a discussion of these problems.

245. To be sure, Congress did not expressly intend to enlarge the substantive rights of the litigants by enacting § 1407. See id.; see also Rules Enabling Act, ch. 651, 48 Stat.
vice is used, the case has not become a truly multi-tort litigation; rather, the case arguably retains its character as essentially a single plaintiff, single defendant lawsuit. Using section 1407 provides the court with the opportunity to engage in the kind of federal-state balancing urged in *Byrd v. Blue Ridge Rural Electric Cooperative*, and the power to regul-

1064 (1934) (currently codified at 28 U.S.C. § 2072 (1982)) (federal rules of procedure enacted pursuant thereto are not to "abridge, enlarge or modify any substantive right"). The question, however, is which jurisdiction should apply the standards that together make up the substantive rights of the parties. Section 1407 is not a tool for the use of litigants and does not by itself allow a federal court to create a "substantive" rule. Rather, it is primarily a tool of the federal judiciary to assist in achieving the just and efficient adjudication of complex cases. See *infra* notes 309, 320-22, 338-49 and accompanying text. By definition, a § 1407 transfer would be permitted when lawsuits were filed throughout the country. 28 U.S.C. § 1407 (1982). When state substantive policies clash such that no "substantive" issue is presented for *Erie* purposes and interstate harm is coupled in multi-tort cases with the federal interest in doing justice—an interest that underlies § 1407—the court must do more than supervise discovery. See *infra* notes 255-371 and accompanying text. But see *Transgrud*, supra note 1, at 804.

Indeed, even though the scant legislative history of § 1407 suggests that the purpose of the transfer is to facilitate discovery, courts have often interpreted these powers more expansively. See C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure:* § 3866, at 378 (1976); Levy, *Complex Multidistrict Litigation and the Federal Courts,* 40 Fordham L. Rev. 41, 59-60 (1971). One reason is that § 1407 provides that the action "may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a) (1982) (emphasis added). Many pretrial proceedings require the resolution of substantive issues. For example, one important pretrial proceeding is the motion for summary judgment. Fed. R. Civ. P. 56. Transferee courts have the power to decide such motions. See, e.g., *In re New York City Mun. Secs. Litig.,* 572 F.2d 49, 51 (2d Cir. 1978); Humphreys v. Tann, 487 F.2d 666, 668 (6th Cir. 1973), cert. denied, 416 U.S. 956 (1974); *In re Butterfield Patent Infringement,* 328 F. Supp. 513, 514 (J.P.M.D.L. 1970). In addition, for all practical purposes, as Judge Friendly pointed out, once the § 1407 transfer is effected, the transferor courts are unlikely to see the case again. *See In re New York City Mun. Secs. Litig.,* 572 F.2d at 51. For example, in the Bendectin litigation, 315 suits were transferred pursuant to § 1407 and another 253 filed in the Southern District of Ohio. *See In re Bendectin Prods. Liab. Litig.,* 102 F.R.D. 239, 240 (S.D. Ohio), *mandamus granted,* 749 F.2d 100 (6th Cir. 1984). The court however, refused to certify the case as a class action for trial. *Id.* at 240 n.4. Once it became clear that the case could be settled, the court certified it for that limited purpose. *See id.* at 241-42. Although the Sixth Circuit later issued a mandamus ordering the district court to vacate its certification order, the court of appeals acknowledged precedent for the notion that a class may be certified exclusively for settlement purposes. *See In re Bendectin Prods. Liab. Litig.,* 607 F.2d 300, 305 & n.10 (6th Cir. 1984); *see also In re Beef Indus. Antitrust Litig.,* 607 F.2d 167, 171, 178 (5th Cir. 1979) (upholding temporary settlement class consisting of all persons, except defendants, engaged in raising fat cattle and who sold a certain amount of cattle per year), cert. denied, 452 U.S. 905 (1981). It is clear that in most cases the transferee court decides the case. *But see* Daniels v. United States, 704 F.2d 587, 588, 591 (11th Cir. 1983) (Swine Flu cases remanded to transferor districts and state law applied). Furthermore, the Multidistrict Litigation Panel and several courts have approved the use of 28 U.S.C. § 1404(a) by a transferee district court judge to retain the consolidated cases for trial. See Rules of Procedure of the Judicial Panel on Multidistrict Litigation 11, 78 F.R.D. 561, 569 (1978); *In re Fine Paper Antitrust Litig.,* 685 F.2d 810, 819-20 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983); Pfizer, Inc. v. Lord, 447 F.2d 122, 124-25 (2d Cir. 1971); *In re Bristol Bay, Alaska, Salmon Fishery Litig.,* 424 F. Supp. 504, 507 (J.P.M.D.L. 1976). *But see* Transgrud, supra note 1, at 804-05.

late in the murky area discussed in Hanna.\footnote{Supra notes 118-30.} As a result, a court might apply a federal rule to certain issues in a case. Whether one characterizes the rules thus created as substantive or procedural\footnote{Supra notes 96-97, 112-17 and accompanying text.} is irrelevant. The point is that *Erie* does not require application of state law when conflicting state interests are present and sufficient federal interests are implicated.\footnote{See supra note 25, at 407. Indeed, since Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the Court has made clear that *Erie* requires application of state law when the policies of avoidance of state-federal forum shopping and equal administration of a state's law are advanced. This is simply another way of saying that *Erie* requires applying state law to avoid thwarting the state's interest in application of its own rule. As a corollary, if the state's interest is not advanced or if the policy of equal administration of justice is undermined, there is no violation of the spirit of *Erie* by not applying state law.}

C. Implying a Federal Rule of Decision

In two recent cases, the Second and Fifth Circuits refused to apply federal common law in mass toxic tort cases. In *Jackson v. Johns-Manville Sales Corp.*,\footnote{750 F.2d 1314 (5th Cir. 1985).} the Fifth Circuit declined to adopt a federal rule on the issue of punitive damages in an asbestos case.\footnote{See id. at 1322, 1327.} In *In re “Agent Orange” Product Liability Litigation*,\footnote{635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981).} the Second Circuit held that the product liability action brought by United States veterans against several chemical companies that produced herbicides containing Agent Orange was not the kind of case properly "governed by federal common law."\footnote{Id. at 995.} These cases will now be examined to demonstrate how a federal court should determine, as a choice of law question, whether to exercise its power to apply a federal or state rule in mass toxic tort cases.

1. *In re “Agent Orange” Product Liability Litigation*

"*Agent Orange,*"\footnote{635 F.2d 987 (2d Cir. 1980), cert denied, 454 U.S. 1128 (1981).} described by some as sui generis,\footnote{Id. at 995 (Feinberg, C.J., dissenting); Speech by Chief Judge Weinstein, American College of Trial Lawyers 1 (Mar. 19, 1985) (Preliminary Reflections on Managing Disasters) (available in the files of the Fordham Law Review).} is in fact the archetypal mass toxic tort case. Indeed, although the plaintiffs' claims were unique because they related to the veterans' exposure to Agent Orange while serving in Vietnam,\footnote{Id. at 996 (Feinberg, C.J., dissenting).} the case clearly had "national dimensions."\footnote{See id. (Feinberg, C.J., dissenting).} Lawsuits were filed in twenty-five federal district courts,\footnote{See In re “Agent Orange,” 635 F.2d at 989.}
with 2,400,000 potential plaintiffs, against five of the largest chemical companies in the United States. All the federal actions, many of which were class actions, were eventually consolidated in the Eastern District of New York.

In "Agent Orange," the court was presented with a motion to dismiss for lack of subject matter jurisdiction. Thus, the question facing the Second Circuit was whether the case arose under federal common law, thereby establishing federal question jurisdiction.

The problem "Agent Orange" presents in the context of this Article is that both the majority and dissent viewed the question of whether to apply federal common law as an all or nothing proposition. The majority concluded that the case did not arise under federal common law because there was no "identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules." The court distinguished the private lawsuit before it from cases such as Clearfield Trust Co. v. United States and United States v. Standard Oil Co. because the case did not "directly implicate the rights and duties of the United States." The majority believed that uniformity is not a federal interest in a private lawsuit not involving substantial rights or duties of the federal government. In addition, the majority noted that even if a

260. See id. (Feinberg, C.J., dissenting). There were at least 800 named plaintiffs. See id. at 988.
261. See id. at 995 (Feinberg, C.J., dissenting).
262. See id. (Feinberg, C.J., dissenting). In addition, at one time it appeared that the claims could amount to billions of dollars. See id. at 996 (Feinberg, C.J., dissenting).
263. See In re "Agent Orange," 635 F.2d at 995 (Feinberg, C.J., dissenting).
264. See id. at 988. If a case is governed by federal common law, it "arise[s] under . . . the Laws of the United States," U.S. Const. art. III, § 2, and thus becomes a basis for federal question jurisdiction under § 1331, see 28 U.S.C. § 1331 (1982).
265. See In re "Agent Orange," 635 F.2d at 995, 999 (Feinberg, C.J., dissenting).
266. Id. at 993.
267. 318 U.S. 363 (1943).
268. 332 U.S. 301 (1947).
269. In re "Agent Orange," 635 F.2d at 993.
270. See id.
271. See id. A key question presented in multi-tort cases is how the character of the parties should affect the federal court's decision to apply federal common law. In Illinois v. City of Milwaukee, 406 U.S. 91 (1972), the Court said that the "character of the parties" was not dispositive in determining whether federal common law applied. Id. at 105 n.6. In Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), however, the Court sidestepped the question whether a private party seeking damages could invoke federal common law, see id. at 21, because in City of Milwaukee, the Court had declared that federal common law was no longer available because Congress had enacted preemptive legislation in that area, see Middlesex County, 453 U.S. at 21-22. See supra note 222. In other cases, such as Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), and Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942), however, the character of the parties was irrelevant. See supra notes 161, 192, 196 and accompanying text.

The character of the parties, however, does have some bearing on the question whether federal common law may be created. For example, in Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956), the plaintiff bank, alleging diversity jurisdiction, sued two individual defendants—the Federal Reserve Bank and another state bank—for
federal statute creates private rights, Congress has occasionally allowed federal courts to borrow state law to fill in the gaps.\textsuperscript{272}

The Second Circuit indicated that it would take an extremely narrow view of the use of federal common law. The majority could not decide whether the government's interest in the welfare of its veterans outweighed its interest in protecting its relations with government contractors.\textsuperscript{273} It concluded that the issue of which group should be favored is the kind of policy matter that should be left to Congress.\textsuperscript{274} Because

converting bonds that were guaranteed for payment by the United States. \textit{See id.} at 30-31. The principal issue at trial was whether the bonds were taken in good faith. \textit{See id.} at 31. The trial judge charged the jury on the issue of burden of proof under state law. \textit{See id.} Sitting en banc, the Third Circuit reversed and found that federal law placed the burden on the plaintiff. \textit{See Bank of Am. Nat'l Trust & Sav. Ass'n v. Rocco, 226 F.2d 297, 299 (3d Cir. 1955) (en banc) (citing Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)), rev'd sub nom. Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956).} In addition, the circuit court had found that there could be no bad faith on the part of the defendant state bank because as a matter of federal law the bonds were not "overdue" when presented for payment. \textit{Id.} at 300-01. The Supreme Court reversed. \textit{Parnell, 352 U.S. at 34.} Although federal securities may "radiate interests in transactions between private parties" the \textit{Parnell} case was "purely between private parties and [did] not touch the rights and duties of the United States." \textit{Parnell, 352 U.S. at 33.} Any federal interest was "far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." \textit{Id.} at 33-34. Thus, the question of good faith was governed by state law. \textit{See id.} at 34.

The Court conceded, however, that the question of "overdueness" was governed by federal law because it involved "the interpretation of the nature of the rights and obligations created by the Government bonds." \textit{Id.} In addition, the Court admitted that "the presence of a federal interest" is not precluded "in all situations merely because it is a suit between private parties." \textit{Id.} Thus, because the transactions in \textit{Parnell} all took place in Pennsylvania, \textit{see id.}, the case does not foreclose use of a federal rule in mass toxic tort cases in which the tort is not similarly localized in one jurisdiction.

272. \textit{See In re "Agent Orange,"} 635 F.2d at 994 (2d Cir. 1980), \textit{cert. denied, 454 U.S. 1128 (1981).} The court's example—the borrowing of state statutes of limitation for cases arising under § 301 of the National Labor Relations Act—ironically, is no longer true. In \textit{Del Costello v. International Bhd. of Teamsters, 462 U.S. 151 (1983),} the Court decided to fashion a federal rule for § 301 cases out of respect for the need for uniformity. \textit{See id.} at 172. But \textit{see Wilson v. Garcia, 105 S. Ct. 1938, 1949 (1985) (Court in § 1983 case will borrow state personal injury statute of limitations).} Another statute, however, explicitly seems to require federal courts to apply state substantive law. The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), explicitly makes the tort liability of the United States dependent on the "law of the place where the act or omission occurred." This command is not inconsistent with the proposal in this Article. Clearly, where Congress has spoken, its authority is paramount. \textit{See supra} notes 51, 333 and accompanying text.

This seems to explain why the Swine Flu cases were remanded to local district courts for trial and why state law was applied. \textit{See, e.g., Daniels v. United States, 704 F.2d 587, 588, 591 (11th Cir. 1985).} Even though the Swine Flu cases could be characterized as multi-torts, the courts had to follow the express mandate of Congress in the Federal Tort Claims Act to use the law of the place where the act or omission occurred. Congress expressly directed the judiciary to proceed as if there were single tort cases once the pretrial discovery phase ended. The problem in the case of private party multi-tort litigation is that Congress has not explicitly provided a clear direction, but rather has enacted various statutes that evince federal policies. Accordingly, the federal courts have power to fashion rules to effectuate that policy until Congress speaks explicitly.

273. \textit{See In re "Agent Orange,"} 635 F.2d at 994.
274. \textit{See id.}
Congress had failed to enact a statute to deal with the issues raised in the "Agent Orange" case, the court declined to devise judicially such a scheme. Thus, it appears that federal common law may not be applied unless the government's interest is essentially monolithic.

The majority's approach 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. This Article maintains that a federal court is free to consider whether to develop a common law rule in appropriate cases. The federal interest need not dictate the content of the rule; determining the rule's substance is the role of the federal courts. As the "Agent Orange" majority necessarily conceded, a court is not always going to create a rule promoting a substantive federal interest.

For example, in United States v. Standard Oil Co. the question was whether the United States could seek indemnification for its expenses from a private party due to injuries suffered by a United States serviceman. The Court decided that the question was one of federal common law because of the government's interest in a uniform rule. However, the Court declined to adopt the rule of liability urged by the government, believing that it was a matter better decided by Congress. The federal interest in a case not involving the government as a party might not be readily apparent, and therefore the need for uniformity might be less apparent. However, as even the "Agent Orange" Second Circuit majority conceded, federal interests do exist in mass toxic tort cases.

The distinction between finding a federal interest sufficient to justify applying federal common law in a choice of law context and finding enough of an interest sufficient to support federal question jurisdiction is critical. In many federal common law cases, the question is whether

275. See id. at 994-95.
276. See supra Part II.
278. See In re "Agent Orange," 635 F.2d at 993.
279. 332 U.S. 301 (1947).
280. See id. at 302.
281. See id. at 307-11.
282. See id. at 313-16.
283. See id. at 316-17.
284. See In re "Agent Orange," 635 F.2d at 995 ("the federal government has obvious interests").
285. See In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 694-97 (E.D.N.Y. 1984). Further, because the Second Circuit was considering the issue of federal common law in a jurisdictional context rather than in a choice of law context, see supra notes 263-64 and accompanying text, it never decided whether sufficient federal interests existed with respect to specific issues in the case so that federal common law could be applied to those issues. The court was arguably correct in concluding that the federal interests presented were insufficient to support federal question subject matter jurisdiction, see In
the case "arises under" federal common law so that federal question subject matter jurisdiction exists. Federal question jurisdiction is limited. Thus, when a court needs to decide whether federal common law exists in order to determine whether there is federal question subject matter jurisdiction, the plaintiff should be required to demonstrate a significant and identifiable federal interest.

However, when the issue before the court is not subject matter jurisdiction, but rather choice of law, the degree of federal interest required need not be as high because the federal court already has jurisdiction over the matter. The federal interest must still outweigh any applicable state interest but need not meet the threshold required for a federal question. 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.

While concluding that the federal interests presented in "Agent Orange" were insufficient to support federal question jurisdiction, the Second Circuit nevertheless noted—perhaps anticipating the choice of law problems that would be presented if the case reemerged—that the use of state law could threaten an "'identifiable' federal policy." To support its position, the court cited two Supreme Court private party federal common law cases. Significantly, the question in those cases was not whether federal question subject matter jurisdiction existed, but rather whether a federal common law rule should be created. The majority concluded, however, that, as in those cases, the federal policy in

re "Agent Orange," 635 F.2d at 995, and that the one regulatory statute, see Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 135-135k (1970) (codified as amended at 7 U.S.C. §§ 136-136y (1982)), cited by the plaintiffs as a basis for such jurisdiction was insufficient to displace an "entire body of state product liability law." In re "Agent Orange," 635 F.2d at 995 n.14. That is different from asserting that federal interests exist to permit applying a federal rule in a choice of law analysis. See, e.g., Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); In re "Agent Orange," 635 F.2d at 993-95.


See id. The Court also agreed with the district court that no implied right of action existed under the statute. See id. at 989 n.3, 991 n.9.


"Agent Orange" was “not yet identifiable.”

It is submitted here, however, that the federal interests were sufficiently identifiable for choice of law purposes because section 1407 was used to transfer the Agent Orange cases to the Eastern District of New York. The district court, when presented with the case after the plaintiffs filed an amended complaint alleging diversity, had the power to apply federal common law.

In making its choice of law decision, the district court appeared to believe it was constrained by the Erie Railroad v. Tompkins, Van Dusen v. Barrack, Klaxon Co. v. Stentor Electric Manufacturing Co. trilogy, which requires a transferee court to apply the substantive and choice of law rules that the transferor court would have applied. Moreover, the court believed that it was bound by the Second Circuit’s statement that the case was not governed by federal common law. Despite these limitations, the court held that something called “national consensus law”—which can only be a euphemism for federal common law—would apply to particular issues in the case. The following analysis will demonstrate that the court’s instincts served it correctly, and that its result is supportable under the analysis in this Article.

The first step in the analysis is to determine whether the various competing interested states’ policies cancel each other out such that a federal rule should be considered. Because the plaintiffs and defendants are citizens of so many different jurisdictions, no one state’s interest can be said clearly to predominate. Next, the court should ask whether Congress intended that a uniform rule be applied in the case. There are at least two indications of congressional intent in the “Agent Orange” litigation. First, the statute cited by plaintiffs as well as other statutes regulating products similar to Agent Orange that may have been relied on by plaintiffs in other cases, suggests that Congress intended that such products

294. In re “Agent Orange,” 635 F.2d at 995 (emphasis added).
296. See supra Part I.
297. 304 U.S. 64 (1938).
299. 313 U.S. 487 (1941).
300. See In re “Agent Orange,” 580 F. Supp. at 692-93. See supra note 238 and accompanying text.
301. See In re “Agent Orange,” 580 F. Supp. at 695.
303. See id.
305. See supra note 45. In addition, there may be other statutes that evince Congress’ concern that parties be either compensated or protected. For example, in In re “Agent Orange,” the defendants had argued that the Compensation for Service-Connected Disability or Death Act, 38 U.S.C. §§ 310-362 (1982), which establishes basic compensation
be held to a uniform minimum accepted level of safety. Second, Congress' enactment of section 1407 provides the basis for allowing a federal court to engage in a choice of law analysis in complex lawsuits such as "Agent Orange."

Section 1407 helps explain why in the private party cases cited by the Second Circuit, which involved neither a 1407 transfer nor interstate harm of the kind presented in multi-tort litigation, the federal interests were too remote or speculative to support applying federal common law. For example, in the first case cited by the "Agent Orange" majority, Miree v. DeKalb County, the plaintiffs were representatives of passengers killed in a plane crash. They sued the county that operated the airports and claimed to be third party beneficiaries of a contract between the county and the Federal Aviation Administration. The contract provided that the county would restrict the use of the land surrounding the airport. The question before the Court was whether Georgia law or federal law applied to the issue of whether third party beneficiary claims were barred by the county's governmental immunity.

Although holding that state law applied, the Court made clear that even in private party cases there may be enough federal interests to consider applying federal common law:

[In 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. It is by no means enough that, as we may assume, Congress could under the constitution readily enact a complete code of law governing transactions. . . . Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.]

for veterans, showed the total extent to which Congress intended veterans to be compensated. See In re "Agent Orange," 635 F.2d at 990 & n.7.


308. See supra notes 125-30 and accompanying text.


311. See id. at 26.

312. See id.

313. See id. at 27.

314. See id. at 27-28.

In *Miree*, the Court concluded that any federal interest in the outcome of the question was "far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of a local concern." In "*Agent Orange,*" there is much more than a "transaction essentially of a local concern." No mere localized tort, such as an aircrash case, is presented. Moreover, the use of section 1407 enhances the interests presented by the relevant federal regulatory statutes and justifies concluding that the supremacy of federal interests should prevail over the inchoate state interests that might otherwise be relevant. Finally, the salutory policy of section 1407, as well as that of any applicable federal regulatory statutes, may be undermined if federal common law is ignored as a possible rule of law in a multi-tort case. Thus, in the final analysis, the question is whether applying state law would conflict with either the remedial purposes of the federal regulatory scheme or the federal interest in providing fair administration of justice in multi-tort cases. If the answer is yes, then the court should be free to imply a federal rule of decision.


In *Jackson v. Johns-Manville Sales Corp.*, the Fifth Circuit, sitting en banc, ruled that a federal rule on punitive damages should not displace a state rule providing for such damages in a single-plaintiff asbestos case. Nine judges were in the majority; five dissented. Like the

---

*Miree*, 433 U.S. at 28-33. Thus, whether federal law or state law applies is itself a question of federal law. Mishkin II, *supra* note 74, at 802 n.20. 316. See *Miree*, 433 U.S. at 32. 317. *Id.* at 32-33. In his concurring opinion, Justice Burger disagreed. *See id.* at 35 (Burger, C.J., concurring). 318. *Id.* at 33. 319. This Article does not propose that federal common law be applied in localized tort cases, even when many persons are injured. In such cases it may be argued that the one state in which the tort occurred should be the primary regulator of conduct unless Congress expressly decides otherwise. Thus, this Article has no quarrel with the result in a case like *Overseas Nat'l Airways v. United States*, 766 F.2d 97, 100 (2d Cir. 1985), in which the Second Circuit held that state law applied in an airplane crash case that involved the United States government's right of contribution. Similarly, federal common law would not be appropriate in the Bhopal gas leak litigation unless other Union Carbide plants in the United States experience similar problems. *See supra* note 1. Although all the plaintiff veterans were exposed to Agent Orange in Vietnam, they were exposed at different times and in different places. *In re "Agent Orange,“* therefore, is not a localized tort case. 320. 28 U.S.C. § 1407 (1982). *See supra* note 239 and accompanying text. 321. *See supra* note 45. 322. The test at this point should be whether the cause of action involves a violation of a provision of a federal statute. If it does, to deny recovery would thwart the scheme. Whether the denial resulted from a restrictive state statute of limitations or a punitive damages recovery that could leave other plaintiffs without a recovery is irrelevant. The argument simply is that a federal rule must be developed to prevent that occurrence. 323. 750 F.2d 1314 (5th Cir. 1985) (en banc). 324. *See id.* at 1326. 325. *See id.* at 1315-16.
majority in the Agent Orange case, the majority in Jackson acknowledged the "massive,"—in other words, national—nature of the asbestos litigation confronting the federal courts.\textsuperscript{326} According to the court, however, that alone was not a basis for creating a federal rule.\textsuperscript{327} The court also rejected the interstate nature of the conflict as a rationale even though it has been applied in cases such as \textit{Hinderlider v. La Plata River & Cherry Creek Ditch Co.}\textsuperscript{328} and \textit{Illinois v. City of Milwaukee.}\textsuperscript{329} The Jackson court did so because it concluded that the conflicts in those cases were between discrete political entities.\textsuperscript{330} Second, according to the court, federal common law could not be fashioned because there was no "uniquely federal interest"\textsuperscript{331} evidenced by "an articulated congressional policy."\textsuperscript{332}

Implicit in the majority's reasoning is that a uniquely federal interest can be evidenced only by a statute created by Congress providing an injured plaintiff with the right to sue.\textsuperscript{333} This ignores the possibility that

\begin{flushleft}
\textsuperscript{326} See \textit{id.} at 1323.
\textsuperscript{327} See \textit{id.}
\textsuperscript{328} 304 U.S. 92, 110 (1938).
\textsuperscript{329} 406 U.S. 91, 103 (1972).
\textsuperscript{330} See \textit{Jackson, 750 F.2d} at 1324. The court was incorrect, however. Even though \textit{City of Milwaukee} involved "political entities," neither case was a state-to-state conflict and \textit{Hinderlider} involved a private party. See \textit{supra} notes 210, 212-23 and accompanying text for a discussion of these cases.
\textsuperscript{331} \textit{Jackson, 750 F.2d} at 1324-25.
\textsuperscript{332} \textit{Id.}

The Court held that state law could be applied because Congress had expressly preserved state law remedies for those injured in nuclear incidents. See \textit{id.} at 255-56. The Court did not consider whether federal common law could be applied. Rather it simply applied the stringent standard for when state law can be entirely preempted. See \textit{id.} at 248. The preemption standard, however, requires more than an implied authority on the part of federal courts to create a federal rule. Rather, Congress must evidence a specific intent to occupy a given field, \textit{id.}, or it must be implicit in the structure and purpose of the federal act or regulation that Congress intended to displace totally state law or state regulatory powers. See \textit{Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2388 (1985)}. The presumption is that Congress did not intend to totally displace state law in areas of traditional state regulation. \textit{Id.} at 2389. In comparing the quantum of evidence of congressional intent that the federal courts create federal common law against the evidence needed to show that federal statutory law has preempted state law, the Supreme Court stated that "the same sort of evidence of a clear and manifest purpose is not required" to show that a federal court has the power to fashion federal common law. \textit{City of Milwaukee v. Illinois, 451 U.S. 304, 316-17 (1981)}. Thus, in \textit{Silkwood}, the Court found that while there was congressional intent to preempt the question of safety regulation, the states remained free to award damages based on their own laws of liability. 464 U.S. at 256. The Court suggested that if there is an "irreconcilable conflict
Congress has made policy on the substance in issue in other federal statutes, as it did on the water pollution issue in the City of Milwaukee litigations and as it has in the area of toxic substances. From such statutes, a court may infer or imply an appropriate legal rule to be applied in a case involving the product. Moreover, it is Congress' provision of a useful procedural tool—section 1407—for achieving a just result that triggers the opportunity for the court to create a federal rule in multi-tort cases.

Jackson, then, should serve as an invitation to the Multidistrict Litigation Panel to use section 1407 to solve the conflicts of law problems between the federal and state standards or if the application of state rules in a damages action "would frustrate the objectives of the federal law," state law must yield. The Court in Silkwood found neither standard met. The result in Silkwood is not inconsistent with the approach used in this Article. In the first place, Silkwood was a localized, two party tort case in which only one state's law was potentially applicable. Thus, it was not the multi-tort case with which this Article is concerned. Second, although the Court did not address whether federal common law could have been applied or whether Silkwood's estate had an implied right of action under the federal statute in issue, the Court left open the possibility that in appropriate cases state law must yield to the policies implicit in the federal statute. Finally, the application of federal common law by federal courts in multi-tort cases as proposed here does not result in the thwarting of a particular state's interests or in total preemption of state law that would have been the case in Silkwood if the defendant's argument had prevailed. See supra notes 104-27 and accompanying text.

335. See supra Part II and infra notes 355-71 and accompanying text. The Supreme Court's statement in City of Milwaukee v. Illinois, 451 U.S. 304, 317-19 (1981), that federal common law no longer exists in the context of cases regulated by the FWPCA does not suggest that federal common law may not be applied when a plaintiff brings a suit in federal court based on diversity jurisdiction. The finding that there was no longer a federal common law of nuisance in the area of interstate water pollution in City of Milwaukee v. Illinois and that there were no cognizable federal common law claims in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 21-22, deprived the federal court of subject-matter jurisdiction. The issue in those cases was whether the cases arose under federal common law so that the court would have jurisdiction under 28 U.S.C. § 1331. In Jackson and the multi-tort cases with which this Article is concerned, the issue is not jurisdiction, but rather choice of law. The federal courts will have diversity jurisdiction pursuant to 28 U.S.C. § 1332, see supra notes 60-70 and accompanying text. Accordingly, federal preemption of the area in such a way as to deprive the federal courts of federal question jurisdiction does not preclude the federal courts from applying federal common law in a case in which the court has proper jurisdiction under diversity and the plaintiffs have stated claims based on state law. Indeed, § 505(1) of the FWPCA expressly preserves the right of persons to seek available relief under any other existing statute or the common law. 33 U.S.C. § 1365(1) (1982). The plaintiffs have state common law causes of action for negligence or strict liability. See supra note 16 and accompanying text. The question then is whether state law or a federally devised rule will govern the legal issues that arise. The argument here is that the enforcement of divergent state standards or rules in multi-tort cases could undermine Congress' intent that the federal acts be preemptive. Indeed, it makes no sense to argue there can be no federal common law as a choice of law matter because a federal statute is preemptive of state regulation, but there remains a right for private persons to seek relief for damages only under state common law and state legal standards.

337. See supra notes 308, 320-22, infra notes 338-49 and accompanying text.
presented in mass toxic tort litigations.\textsuperscript{338} “Doing justice” may be an inadequate criterion for permitting a federal court to engage in lawmaking in the single tort case, as the Fifth Circuit found. But, 20,000 cases similar to Jackson were in the court system.\textsuperscript{339} The pervasiveness of the problem shows the need for the federal courts to “do justice.”\textsuperscript{340} Had the 20,000 cases been consolidated by the Multidistrict Litigation Panel, the Fifth Circuit majority could not have ignored the express command of Congress when it enacted section 1407 to use the statute to assure “the ‘just and efficient’ ”\textsuperscript{341} conduct of multidistrict proceedings.\textsuperscript{342}

Finally, when this inquiry is undertaken pursuant to section 1407 consolidation, the last problem raised by the Jackson court—application of federal common law would open the way for each district to formulate a new rule of law—disappears. Because the Multidistrict Litigation Panel transfers the cases, and future “tag along” cases\textsuperscript{344} the insidious forum shopping problem and “equal protection” concerns of the Erie and Hanna Courts also disappears.\textsuperscript{345} Under this Article’s analysis, the decision of the district court handling the proceedings after a section 1407 transfer would provide the only federal rule. Thus the need for uniformity is protected.\textsuperscript{346} There would not be ninety-one\textsuperscript{347} or twelve...
other federal rules competing with the fifty state rules.\textsuperscript{348} Admittedly, the task of determining the content of the federal rule may not be easy, but the common law as expressed by the courts has always been the primary source of tort rules.\textsuperscript{349}

\textsuperscript{347} There are 91 district courts. See 28 U.S.C. §§ 81-131 (1982).

\textsuperscript{348} There are thirteen federal courts of appeals. See 28 U.S.C. § 41 (1982). The Federal Circuit, however, does not have jurisdiction over private tort cases. Nevertheless, according to \textit{Jackson}, the twelve circuits having jurisdiction could formulate different rules. See \textit{Jackson}, 750 F.2d at 1326.

\textsuperscript{349} Indeed, the common law that has developed is preferable to any statutory solution because it "has a rational sense built on the foundation of centuries of tort law." Twerski \& Weinstein, \textit{A Critique of the Uniform Products Liability Law—A Rush to Judgment}, 28 Drake L. Rev. 221, 222 (1978); see also Ursin, \textit{Judicial Creativity and Tort Law}, 49 Geo. Wash. L. Rev. 229, 246-50 (1981) (courts are competent to decide complex social policy issues). The proposed federal tort legislation has been criticized for similar reasons. Spacone, \textit{The Emergence of Strict Liability: A Historical Perspective and Other Considerations; Including Senate 100}, 8 J. Prods. Liab. 1, 2 (1985) (S. 100 will be only a partial solution because it will have a very limited impact on activist state courts that attempt "to shape tort law to satisfy what they perceive[d] to be the needs of society and the value and beliefs of America itself embodied in juries"); see also Rheingold, \textit{The Expanding Liability of the Product Supplier: A Primer}, 2 Hofstra L. Rev. 521, 523-26 (1974) (discussing various elements of the cause of action derived from the common law); Wade, \textit{On the Nature of Strict Tort Liability for Products}, 44 Miss. L.J. 825, 828-38, 841-48 (1973) (outlining the type of conduct that will subject a supplier to strict liability). See \textit{generally} G. Calabresi, supra note 277, at 1-7, 31-32 (discussing how an American jurisprudence, so deeply rooted in the common law approach, has reacted to the "orgy of statute making" (quoting G. Gilmore, \textit{The Ages of American Law 95} (1977))). Common law rules are preferable to statutory solutions also because more objective criteria are the basis of decision. Statutes are commonly enacted because some interest groups have sufficient political power to ensure the passage of an act that will provide them with particular benefits. See P. Rubin, Business Firms and the Common Law 166 (1983) (citing Stigler, \textit{The Theory of Economic Regulation}, 2 Bell, J. Econ. \& Mgmt. Sci. 3 (1971)); Kau \& Rubin, \textit{Self-Interest, Ideology and Logrolling in Congressional Voting}, 22 J.L. \& Econ. 365, 366-67 (1982); Peltzman, \textit{Toward a More General Theory of Regulation}, 19 J.L. \& Econ. 211, 212-13 (1976). Many states, however, are adopting products liability statutes. See, e.g., Colo. Rev. Stat. §§ 13-21-401 to -406 (Supp. 1984); Conn. Gen. Stat. Ann. §§ 52-572m to -572r (West Supp. 1984); Idaho Code §§ 6-1401-1409 (Supp. 1984). See \textit{generally} R. Herrmann, \textit{An Overview of State Statutory Products Liability Law} in 1983 Trial Lawyers Guide 1 (discussing various states' product liability statutes).

Nevertheless, the conflicting state and private interests seem to render it virtually impossible for Congress to fashion a sensible statutory rule. See Spacone, supra, at 1-2. In light of this, it is not surprising that Congress has been unable to enact a federal products liability act. The latest version of a Federal Product Liability Bill is S.100, 99th Cong., 1st Sess. § 2,131 Cong. Rec. S 218 (Jan. 3, 1985). For a general discussion of the Bill, see Spacone, supra, at 1-2, 37-40. The argument here is that the federal court should develop rules based on the policies underlying federal regulatory statutes for adjudicating multi-tort cases until Congress acts. Indeed, a "vital Court task, after all, is the interpretation of legislation . . . free from ulterior purposes . . . . [This will] be impaired if . . . . the Court . . . invoke[s] an often spurious legislative intent to promote the Court-Congress colloquy. . . ."; Gunther, \textit{The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review}, 64 Colum. L. Rev. 1, 21 (1964). Indeed, the scope of judicial interpretation of existing regulatory statutes should be exceedingly broad, for frequently no single interpretation is manifestly right because vagueness in crucial statutory terms or in legislative history will often be a prerequisite to obtaining approval from all the groups that could block enactment, as in the case in the Federal Products Liability Bill, see S. 100, 99th Cong., 1st Sess. § 2, 131 Cong. Rec. S 218 (Jan. 3, 1985).
Should the courts go too far, by either misreading the policy underlying a federal statute, or by excessively encroaching on viable state interests, Congress can enact an explicit statute more clearly defining the legislative scheme, as it did in the \textit{City of Milwaukee}.\textsuperscript{350} Once Congress enacted a comprehensive scheme, the federal common law rules that the Supreme Court had formulated to give the Court jurisdiction and to provide a cause of action had to yield.\textsuperscript{351} It is not enough to say that Congress alone is responsible for balancing competing interests. Indeed, in \textit{Byrd v. Blue Ridge Electric Cooperative},\textsuperscript{352} and in \textit{Illinois v. City of Milwaukee},\textsuperscript{353} the Court recognized that this was a function of the federal courts as well.\textsuperscript{354} Therefore, until Congress enacts a comprehensive federal products liability and toxic tort compensation act, the federal courts should accept their responsibility and exercise their implicit authority to create federal rules of decision in multi-tort cases.

3. A Not So Hypothetical Case

To sketch how this approach would work, the following facts are posited: the defendant New York corporation is a company that processes toxic waste. It has grown dramatically since it was founded in 1950 with one plant in a small town in upstate New York. The defendant now has

\textsuperscript{350} See \textit{supra} notes 212-23 and accompanying text for a discussion of this case.
\textsuperscript{351} See \textit{supra} note 221 and accompanying text.
\textsuperscript{352} 356 U.S. 525 (1958).
\textsuperscript{353} 406 U.S. 91 (1972).
\textsuperscript{354} \textit{See City of Milwaukee}, 406 U.S. at 106-07; \textit{Byrd}, 356 U.S. at 536-39. Implied right of action cases are a sign of judicial concern that Congress' express statutory command is not complete. See \textit{supra} note 239. Certainly, then, to argue for an implied rule of federal law from express statutory scheme is not a novel idea. See \textit{supra} notes 159-93 and accompanying text discussing \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 448 (1957); \textit{see G. Calabresi, supra note 77, at 11; Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case}, 71 Harv. L. Rev. 1, 15 n.59, 19-20 (1957); Wellington, \textit{Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication}, 83 Yale L.J. 221, 262 (1973). If a plaintiff is properly in federal court under § 1332, 28 U.S.C. § 1332 (1982), which provides for diversity jurisdiction, or some other jurisdictional statute on a state created cause of action, the court should imply a remedy from the policy embodied in the federal regulatory statute. \textit{Cf. Guaranty Trust Co. v. York}, 326 U.S. 99, 106 (1945) ("[f]ederal court[s] may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it"). The penumbra of the federal regulatory scheme, see \textit{supra} note 178 and accompanying text, provides the basis for developing a rule which will result in providing a remedy. With current thinking about the availability of relief for toxic tort changing, see \textit{supra} note 6 and accompanying text, and because of Congress' legislative inertia with respect to private damage actions, see \textit{supra} note 349, the federal courts should create common law rules until Congress modifies its regulatory statutes to make its intent clear. \textit{Cf. G. Calabresi, supra note 277, at 10 ("the statute was probably out of phase with current thinking and probably remained in force only because of legislative inertia") (citing Califano v. Goldfarb, 430 U.S. 199, 223 n.9 (1976) (Stevens, J., concurring) (agencies should fill in gaps left by legislative inertia)); Friendly II, supra note 277, at 805 (1977).
plants in 34 states throughout the country. In 1983, numerous residents of the small upstate town noticed an increasing and abnormally high rate of various cancers. Shortly thereafter, residents near the other plants noticed a similar pattern. Individual lawsuits were subsequently filed in state court in New York and federal courts in 34 other states alleging negligence on the part of the defendant that led to the cancers. The plaintiffs include persons who had developed the cancers who sought damages, as well as others who sought injunctive relief. What should happen next?

First, it is proposed that the Multidistrict Litigation Panel consolidate all the federal actions pursuant to section 1407. Once the actions are transferred to a specific district court, the plaintiffs should consider proceeding as a class action so that New York plaintiffs could be made members of the class, thus eliminating the need for a parallel state proceeding. In addition, any subsequent cases can be transferred and the results of discovery shared. Assuming these efficiencies are achieved, the question then becomes whether state law or federal law should apply.

Under the test proposed in Part I, the rights and liabilities of the parties cannot be said to arise out of any particular state's law. Rather, the potentially conflicting state policies underlying the interested states' rules would cancel each other out such that no "substantive" law issues are presented for *Erie* purposes. Accordingly, the federal court to which the cases have been transferred may consider whether there is any implied authority to create a federal rule to apply instead of the otherwise relevant state rules.

The court could look to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Resource Conservation and Recovery Act of 1976 (RCRA). A reading of the legislative history of these acts would show that Congress enacted them to mitigate some of the problems caused by hazardous waste sites. The court, therefore, could find that the Acts evidenced congressional intent that remedies be provided to those injured by incidents involving hazardous wastes.

However, CERCLA provides no explicit private remedy for personal injuries. In fact, the legislative history indicates that a provision allowing a private right to sue for personal injuries was considered but not incorporated into the Act. This does not suggest that the Act fails to

---

359. See 42 U.S.C. § 9607(a), (i), (j) (1982); id. § 9611(a)(ii), (j), (l).
360. Senate Debates on Stafford-Randolph Substitute to S. 1480, Nov. 24, 1980, 126 Cong. Rec. 30,897-987 [hereinafter cited as Senate Debates]; see also id. at 30,941 (re-
provide a basis for fashioning a federal common law rule. Rather, the
court could look to Section 107(i) of CERCLA, which provides that
"[n]othing in this paragraph shall affect or modify in any way the obliga-
tions or liability of any person under any other provision of State or Fed-
eral law, including common law, for damages, injury, or loss resulting
from a release of any hazardous substance. . .". From this provision,
it may be inferred that Congress intended that the courts fill in the gaps
left open by the Act. Indeed, in describing the necessity for CERCLA,
Congress noted that the Act was necessary to fill in some of the gaps left
by other federal statutes. CERCLA, however, was hastily drafted. Accordingly, there is no committee report of definitive legislative history
defining the Act's scope. Therefore, a court must conclude that Con-
gress intended that the courts exercise their preexisting power to apply
state law or to fashion a federal common law rule, when appropriate,
based on its reading of congressional intent.

Moreover, there is no City of Milwaukee problem because there is
no expression that Congress intended CERCLA to entirely preempt the
area. Further support of legislative intent is found when CERCLA is
read together with the provisions of the RCRA for injunctive relief and
citizen suits. Congress has interpreted the predecessor to section 6973
as a codification of the common law of nuisance. There is some sup-
port for the view that Congress failed to include a federal cause of action
for damages simply as a compromise. Rather than risk losing passage
of an Act providing for clean-up, advocates of a federal private remedy
decided to avoid the controversy such a scheme would generate. Congress,
however, did not intend to leave private litigants without a remedy
for personal injuries. Rather, a savings clause was provided that pre-
serves the right to sue under "State or Federal law, including common

marks of Sen. Mitchell) ("[T]his bill is deficient because while it provides for the cleanup
of places, and compensation for damage to things, it provides nothing for what is the
most important part of the problem: injury to people. The guiding principle of those
who wrote S. 1480 was that those found responsible for harm caused by chemical con-
tamination should pay for the costs of that harm. We are abandoning that principle here
today when the damage involved is to a person.").

364. Id.
& Ad. News 5019, 5023.
369. See Senate Debates, supra note 359, at 30,952; (remarks of Sen. Culver); id. at
370. Id.
law. To refuse to allow the courts to fashion a federal rule to enforce the policy underlying the federal act would in essence create a gap in the enforcement scheme that Congress did not intend. In fact, some lower courts have found that federal common law should be applied in cases to which CERCLA and RCRA may apply. Allowing federal common law to apply will have the effect of promoting the remedial purposes of CERCLA. That is, Congress' intent that toxic waste sites be cleaned up will be promoted because corporations will be more inclined to sign consent agreements with the Environmental Protection Agency requiring an immediate clean-up so that future personal injury actions will be avoided as well as the uncertainty that accompanies litigation when various states' rules are applicable.

**CONCLUSION**

The presence of relevant federal regulatory statutes, in addition to the national scope of the harm and the availability of a section 1407 transfer, compels a federal court to engage in a choice of law analysis that considers the propriety of creating a federal rule in multi-tort cases. The court should first determine whether the policies of any of the interested states essentially cancel each other out. If so, it should next explore whether applying a federal rule offends a particular state's interest or undermines the twin purposes of *Erie*. Finally, a court should analyze whether federal interests evoked by federal statutes outweigh state interests. If they do, the court should create and apply a federal rule on the issue.

This Article's proposal to allow federal courts to consider whether a federal rule should be applied to particular issues when a multi-tort case has been transferred pursuant to section 1407 will not unduly interfere with the development of state law. Indeed, it is not proposed that federal common law must apply in state court actions. Rather the Article suggests a choice of law analysis that would permit only the federal courts hearing a case after a section 1407 transfer to consider the distinctly national aspects of the case.

We need not fear forum shopping or the kind of unequal administration of law discussed in *Erie Railroad v. Tompkins* that provided the basis for *Klaxon Co. v. Stientor Electric Manufacturing Co.* and *Van Dusen v. Barracks* because the Multidistrict Litigation Panel, not the parties, chooses the federal court to which the case would be transferred, and because multi-tort cases are not simple two party actions. The

---

374. 304 U.S. 64, 74-75 (1938).
375. 313 U.S. 487, 496 (1941).
courts should engage in a choice of law analysis that requires them to measure competing state interests, as well as federal interests evidenced by statutes and the need to treat litigants fairly, to determine whether state law or a federal rule should be applied. This kind of analysis is always necessary to resolve choice of law questions and is no more burdensome in this context than in any other. Finally, although adopting this approach may lead some litigants to choose a federal forum, the more insidious form of state-to-state forum shopping will probably be eliminated in most cases. The federal courts will thus be in the best position to provide a fair resolution of the myriad problems raised in mass toxic tort litigation.