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Agent Orange and Asbestos: A Care for Federal Common Law

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AGENT ORANGE AND ASBESTOS: A CASE FOR FEDERAL COMMON LAW

The mass toxic tort litigation explosion proves that the use of hazardous chemicals presents difficult problems for the people who come into contact with these substances. The instances of death and illness which follow such contact not only pose complex questions of causation, but also of society's role in fairly compensating victims. Afflictions arising from exposure to one product may result in thousands of claims. These claims differ substantially from those based upon a single tort incident such as an airplane crash or a collapsed skywalk.1 Mass tort litigation often involves similarly situated plaintiffs filing lawsuits in many different jurisdictions.2

The main distinction drawn here, however, is that mass accident torts involve far fewer jurisdictions than mass toxic torts. As a result, a mass accident tort litigant does not face the myriad of statutes of limitations problems inherent in mass toxic tort cases. Mass toxic torts may involve latent claims which draw not only those first injured, but also their families into the dispute.

Other problems stem from indeterminate plaintiffs and defendants. For the afflicted, there are relevant questions which involve the effects upon unborn children as a result of the toxic exposure. The disparate amount of toxic substances produced by defendant manufacturers clouds the ability to assess fault.3 Discovery costs overburden the defendants facing suits in many jurisdictions while plaintiffs lack adequate resources to challenge the defendant companies. Such expenses not only divert funds which injured

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1. These incidents involve a specific number of claimants in a limited number of jurisdictions. See, e.g., In re Air Crash Disaster at Boston, Mass. on July 31, 1973, 399 F. Supp. 1106 (D. Mass 1975); In re Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), vacated 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

2. See, e.g., In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 750 (E.D.N.Y. 1984) [hereinafter "Settlement Opinion"] (six hundred pre-consolidation cases were filed in state and federal courts throughout the United States). See also In re Union Carbide Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2d Cir.) cert. denied, 108 S.Ct. 199 (1987). The Bhopal tragedy, which resulted in more than 2,000 deaths and 200,000 injuries, illustrates the difficulty of managing a toxic tort disaster which also has international legal and jurisdictional dimensions. The Second Circuit affirmed the District Court's dismissal of the case on the grounds of forum non conveniens.

plaintiffs need, but also lead to company bankruptcy proceedings.4

The courts' adherence to the traditional methods of civil dispute resolution fails to address these problems resulting in a lack of uniformity in the remedies even in instances where the illnesses of different plaintiffs arise from the defendant's same tortious conduct. A less injured plaintiff could receive more compensation than others similarly situated. Also, some state statutes of limitations would honor claims while others would not.

The federal circuit courts have not recognized the strong federal interest in mass tort litigation. Congress, through its broad commerce powers, has passed numerous laws governing the manufacture and use of toxic chemicals.5 These laws exhibit a strong national interest in protecting an unsuspecting public from the disastrous effects of toxic substances.

It is against this background that issues of federalism arise in mass tort cases. The tradition of applying state law clashes with novel theories of managing these disputes. These new theories stress the substantial federal interest in mass tort litigation. The most compelling idea concerns the application of federal common law to alleviate the burdens imposed upon plaintiffs, defendants, and the courts.

This Comment stresses the need for the application of federal common law in mass tort cases. The Comment first traces the historical and legal importance of state law in tort disputes. A discussion of the overriding federal interest in the Agent Orange and asbestos cases follows this section. Finally, this Comment examines the proposed solutions to mass tort choice-of-law problems and proffers new methods for future adjudication.

I. THE ERIE DOCTRINE AND FEDERAL COMMON LAW

In Erie R.R. Co. v. Tompkins,6 the Supreme Court held that federal courts do not have the general law-making powers of state courts. The limited jurisdiction of federal courts must follow state common law decisions as well as state statutes in the absence of explicit governing federal law.

4. See T. WILLING, TRENDS IN Asbestos LITIGATION 100 (Federal Judicial Center 1982) ("[a]t least six manufacturers of asbestos products have filed for Chapter 11 reorganization in bankruptcy court").


6. 304 U.S. 64 (1938).
A. Erie and Swift v. Tyson

In *Swift v. Tyson*, the Supreme Court held that Section 34 of the Judiciary Act of 1789 only required the application of state statutes and not of state common law. Justice Story, writing for the majority, held that the word “laws” in the Act spoke only to rules of the state legislature and not to the common law. *Swift* involved the law of negotiable instruments which Justice Story viewed as a matter involving the whole commercial world.

The Supreme Court subsequently extended *Swift* beyond commercial law into tort law. In *B. & O. Railroad v. Baugh*, the Court held that the question of whether a train engineer and fireman were fellow-servants in the defendant company in a negligence action was a matter of general common law. Referring to *Swift*, the Court cited the lack of a relevant state statute, local custom, and property rules to negate the application of federal common law. While some commentators consider *Baugh* an “extreme extension of *Swift*,” it represents an affirmation of Court precedent concerning railroads. *Baugh*’s dissent represents the first instance of growing judicial distaste for the *Swift* doctrine. Justice Field, foreshadowing *Swift*’s potential abuse through forum shopping, dismissed federal common law as “little less than what the judge advancing the doctrine thinks at the time should be the

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8. 1 Stat. 92 (“The laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”).
10. *Id.* (“The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of law.”). *Id.*
12. 149 U.S. 368 (1893).
13. *Id.* at 370. (“This is not a question of local law, to be settled by an examination of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but one of general law....”). *Id.*
general law on a particular subject. . . .” 15

In practice, Swift did not achieve its desired ends.16 The grave discrimination caused by Swift led to its demise in Erie R. R. Co. v. Tompkins.17 Perhaps the most blatantly discriminatory example occurred in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co. 18 There, a plaintiff succeeded in a suit to enjoin a competitor from interfering with an exclusive contract. Since the common law of Kentucky voided such contracts, the plaintiff reincorporated in Tennessee which honored such agreements. This form of forum shopping caused widespread criticism of the Swift decision.19 The Erie Court also cited the persistence of state courts in maintaining their common law, and the impossibly vague distinctions between general and local law.

Justice Brandeis noted the “mischievous results” in diversity of citizenship cases.20 Particularly odious was the twisted ability of a non-citizen to determine the outcome of a dispute simply by filing suit in the forum (state or federal) whose applicable law was more favorable to his claim. Justice Brandeis perceived no basis in the Constitution for granting power to Congress or the federal courts to fashion substantive rules of local or general common law in a specific state.21 In sum, the Court held the circuit court’s ruling contrary to Pennsylvania law as an improper invasion of constitutional principles.

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15. Baugh, 149 U.S. at 401. (Field, J., dissenting) (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.”).

16. Swift, 41 U.S. at 18. Justice Story hoped that Swift would make uniform state and federal law. His strong belief in such uniformity is evidenced by his quotation from Cicero stating that the law among the Romans cannot differ from the law among the Athenians. Id at 19.

17. 304 U.S. 64 (1938).

18. 276 U.S. 518 (1928).

19. See, e.g., Dobie, Seven Implications of Swift v. Tyson, 16 VA. L. REV. 225 (1930); Ball, Revision of Federal Diversity Jurisdiction, 28 ILL. L. REV. 356, 362-64 (1933); Jacobson, Federal Interpretation of State Law, 86 U. PA. L. REV. 335 (1938).

20. See 28 U.S.C. § 1332 (1982). The statute in pertinent part states that “(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . between —

1. citizens of different States

2. citizens of a State or of a foreign state . . .” The historical justification for diversity jurisdiction is to protect the nonresident party from local state court bias. Id. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483, 510 (1928) (“This had its origins in fears of local hostilities, which had only a speculative existence in 1789, and are still less real today.”), See also 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (1984) [hereinafter FEDERAL PRACTICE AND PROCEDURE].

21. Erie, 304 U.S. at 78.
B. Modifications of the Erie Doctrine

Ironically, on the same day that Justice Brandeis wrote in *Erie* that “[t]here is no federal general common law,”22 he also declared that federal common law applied to interstate streams in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*23 In essence, Justice Brandeis carved the first exception to *Erie* by recognizing an overriding federal interest in interstate waters.

An important development in the *Erie* doctrine requires the application of state law if “it significantly affect[s] the result of litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a state court.”24 This “outcome determinative” test works well in a simple product liability tort action. However, difficulties with this approach arise in mass tort cases. These problems are discussed infra.

This new *Erie* test spurred further exceptions to the doctrine. In *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*,25 the Court held that “counter-vailing considerations” permit a balance between state and federal interests.26 While the Court generally hesitates to expand federal law, *Byrd* shows the Court’s willingness to defer to substantial federal interests.27

II. FEDERAL COMMON LAW DEFINED

Federal common law is created by a court to resolve a matter where no reference to the Constitution, federal statutes, or state law directly settles the issue.28 Whereas pre-*Erie* general common law caused two regimes of rules for similar situations, post-*Erie* federal common law binds the states by virtue of the Supremacy Clause. As a result, federal courts are bound to follow state decisions which involve state issues and state courts are therefore bound to follow federal decisions which involve federal issues.29

22. *Id.* at 78.
23. 304 U.S. 92, 110 (1938).
26. *Id.* at 537.
28. See Field, * supra* note 11, at 890 (defining federal common law as “any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments - constitutional or congressional.”) (emphasis in original); Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law*, 54 FORDHAM L. REV. 167, 189 (1986) ("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.").
The courts recognize a presumption in favor of applying state laws to a particular controversy. Some areas, however, are viewed as the traditional bailiwick of the federal courts. Professor Hill defines a four zone theory which outlines these areas. The four zones include maritime cases, international law cases, interstate cases, and those cases involving the proprietary interests of the United States. Other commentators, however, see "no bright lines delineating matters of which federal courts have the power to develop and apply federal common law. . . ."

The Court's most common Erie exception stems from the rights and duties of the United States in commercial paper transactions. In *Clearfield Trust Co. v. United States*, the Court held that federal common law governed the controversy because of specific federal competence in the area and the need for national uniformity. Again, the Court stressed the importance of balancing federal and state interests in arriving at the decision. Supreme Court decisions following *Clearfield* focus upon similar criteria. These cases look to a unique federal interest and implicit or explicit congressional permission to employ federal common law.

Federal common law developed beyond *Clearfield* to include suits between private parties. In *Textile Workers v. Lincoln Mills*, the Court held that in a labor union's suit to compel arbitration under § 301(a) of the Labor Management Relations Act, federal common law applied to the controversy. While the Act did not expressly call for the application of federal common law, Justice Douglas saw implied federal rights in the "penumbra of express statutory mandates." *Lincoln Mills* holds a prominent place in the development of federal common law. More importantly, it shows that a federal court does not need reference to express congressional permission in

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32. 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 221.

33. 318 U.S. 363 (1943).

34. Id. at 366-67.

35. See, e.g., *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1967) (federal common law may be applied when federal rights stem from federal sources of law); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal common law applied even though neither the United States nor a federal officer was a party).


order to apply federal common law.\textsuperscript{39} In \textit{Illinois v. City of Milwaukee},\textsuperscript{40} the Court unanimously found that federal common law applied where federal environmental statutes involving interstate waters expressed federal concerns.\textsuperscript{41} Once again, the Court provided a federal remedy where federal interests were involved. Here, the combination of statutes and the interstate nature of the dispute proved that "\[i\]t is not uncommon for federal courts to fashion federal law where federal rights are involved."\textsuperscript{42} Against this background, the case for application of federal common law in other areas is made stronger.

III. \textbf{Agent Orange and Federal Common Law}

While \textit{Erie}-based decisions stress the prominent role of state law, sufficient leeway to permit the application of federal common law remains. As Part I of this Comment indicates, the courts have refused to render the \textit{Erie} principles absolute. Two mass product liability cases, involving Agent Orange and asbestos, exemplify the type of \textit{Erie} exception to which the courts refer. The federal courts, however, are not uniform in their approval of applying federal common law in mass tort cases.

\textbf{A. Agent Orange}

In 1979, a complaint was filed in the Eastern District of New York on behalf of Vietnam Veterans and their families alleging injuries caused by exposure to Agent Orange.\textsuperscript{43} While seventeen defendant chemical companies were named, only seven remained when the dispute was finally settled in 1984.\textsuperscript{44} From 1979 to 1983, the parties wrangled with complex jurisdictional issues until the plaintiffs attained class certification and reasserted diversity jurisdiction. A trial date was set for May 7, 1984. On that day, the

\begin{footnotesize}
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\item \textsuperscript{39} \textit{Id} at 457. In reference to the Act's ambiguous areas regarding substantive law, Justice Douglas stated further that "[s]ome 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." \textit{Id}. The mass tort context provides a similar situation whereby Congress has passed considerable legislation concerning toxic chemicals.
\item \textsuperscript{40} 406 U.S. 91 (1971).
\item \textsuperscript{41} \textit{Id}. at 99-101.
\item \textsuperscript{42} \textit{Id}. at 103 (quoting \textit{Lincoln Mills}, 353 U.S. at 457).
\item \textsuperscript{43} The name "Agent Orange" comes from the orange ring painted around the chemical container distinguishing it from other herbicides. The chemical proved effective in defoliating the lush Vietnam jungle which obstructed Viet Cong activity. Manufacturers have long maintained that no evidence exists to prove that soldiers were heavily exposed to Agent Orange. \textit{But see Scientists Say Troops Heavily Exposed To Defoliant}, Washington Post, Jan. 23, 1989, at A2, col. 3.
\item \textsuperscript{44} \textit{Settlement Opinion}, 597 F. Supp. at 753.
\end{itemize}
\end{footnotesize}
plaintiffs accepted a settlement offer of 180 million dollars.\textsuperscript{45} Eventually, the Second Circuit affirmed both the class certification and settlement,\textsuperscript{46} and summary judgment was granted against class opt-outs.\textsuperscript{47} The court did not, however, approve an attorney fee-sharing agreement.\textsuperscript{48}

The *Agent Orange* litigation involved a great number of plaintiffs and a large sum of money.\textsuperscript{49} As a prominent landmark for future mass toxic tort cases, *Agent Orange* forces our society to recognize the strong possibility of recurring toxic incidents.\textsuperscript{50} In order to confront the litigation's numerous problems, reviewing choice-of-law problems is necessary.

In their initial complaint, the plaintiffs' stated that their basis for federal jurisdiction was 28 U.S.C. § 1331 (1982).\textsuperscript{51} They contended that their claims arose under United States statutes and common law. The plaintiffs sought an implied private cause of action from various laws governing toxic substances.\textsuperscript{52} The district court subsequently rejected this argument.\textsuperscript{53}

The court ruled favorably upon the complaint's call for federal common law.\textsuperscript{54} Judge Pratt sustained this choice-of-law because there were "significant federal interests in this litigation."\textsuperscript{55} The decision by Judge Pratt was not a nonsensical rush to create an easy solution. Rather, he reasoned that mass tort product liability litigation was not an area of expertise for state courts.\textsuperscript{56}

To Judge Pratt's credit, he acknowledged the weight of authority against federal common law. In citing *Miree v. DeKalb*,\textsuperscript{57} Judge Pratt raised the Supreme Court's admonition that "the issue of whether to displace state law

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\item \textsuperscript{45} *Id.* at 748. For a thorough review of the *Agent Orange* procedural history, see Note, Procedural History of the *Agent Orange* Product Liability Litigation, 52 BROOKLYN L. REV. 335 (1986).
\item \textsuperscript{46} 818 F.2d 145, 174 (2d Cir. 1987).
\item \textsuperscript{47} 818 F.2d 187, 194 (2d Cir. 1987).
\item \textsuperscript{48} 818 F.2d 216, 226 (2d Cir. 1987).
\item \textsuperscript{49} P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS DISASTERS IN THE COURTS* 4-5 (1986). (Six hundred actions were originally filed by over 15,000 plaintiffs in the United States. Eventually the litigation involved over two million veterans and their families. Plaintiffs' costs exceeded ten million dollars while the defendants grew to one hundred million dollars. The docket sheet was 425 pages in length including 7,300 entries.).
\item \textsuperscript{50} *Id.* at 14. (The EPA currently has identified over 19,000 hazardous waste sites. Cleanup costs could exceed 100 billion dollars.).
\item \textsuperscript{51} In re *Agent Orange* Prod. Liab. Litig., 506 F. Supp. 737, 740 (E.D.N.Y. 1979).
\item \textsuperscript{52} *Id.* at 740-41; see also supra note 5.
\item \textsuperscript{53} *Id.* at 741-42.
\item \textsuperscript{54} *Id.* at 749.
\item \textsuperscript{55} *Id.*
\item \textsuperscript{56} *Id.* ("[S]tate law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad."). *Id.*
\item \textsuperscript{57} 433 U.S. 25, 32 (1977).
\end{itemize}
or an issue such as this is primarily a decision for Congress." The issue in Miree, whether private parties may, as third party beneficiaries, sue a municipality for breach of FAA contracts, does not compare with the types of issues in the Agent Orange case. The substantial federal interests implicated in the Agent Orange dispute were not "far too speculative" to prevent an application of federal common law. The district court then sought to establish the foundation for invoking common law. While the court disagreed with the plaintiffs' choice of the Clearfield standard, Judge Pratt found his justification in the rationale of United States v. Standard Oil.

The district court applied a three-factor test in combination with the Supreme Court's reasoning in Standard Oil. There, the United States sought recovery from the defendant for a soldier's hospitalization costs after the defendant's truck injured him. The Court held that the relationship between the government and its soldiers is "fundamentally derived from federal sources and governed by federal authority." The test Judge Pratt used to determine whether federal common law applied was based upon: (1) a substantial federal interest in the outcome; (2) the effect of a state law application upon this interest; and (3) the effect of a federal common law application upon state interests. This test properly balances state and federal interests mandated by the Supreme Court.

In dealing with the first factor Judge Pratt articulated the importance of preventing interference with the relationship between government and soldier. The court also held that the federal interest rose commensurate with the increasing liability of the defendants and the large number of veterans claiming injuries.

The second and third standards applied by the court consider the balance of federal and state law. Under the second factor, the court emphasized the burdensome effect of varying state laws upon federal interests because of the unfairness which would result from treating similarly situated plaintiffs.

60. 332 U.S. 301 (1947).
61. Id. at 302.
62. Id. at 305.
63. Agent Orange, 506 F. Supp. at 746.
64. Id. The court dismissed the defendants' claim that the plaintiffs' injuries were adequately covered by the Compensation for Service-Connected Disability or Death Act, 38 U.S.C. § 310 et seq. (1976). "The limited nature of compensation provided by 38 U.S.C. § 310 et seq. makes it an insufficient guardian of the rights at stake in this litigation." Id. at 747.
65. Id. at 747.
66. Id. at 748.
differently.\textsuperscript{67} Turning to the third standard, the court reasoned that tort claims are traditionally state law matters.\textsuperscript{68} However, the court distinguished traditional torts by asserting that "state law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad."\textsuperscript{69} Therefore, Judge Pratt held that a displacement of state law would not adversely affect state interests.\textsuperscript{70} For the above-cited reasons, the district court assumed subject matter jurisdiction over the \textit{Agent Orange} dispute.

After distinguishing \textit{Clearfield} and \textit{Standard Oil} from \textit{Agent Orange}, the Second Circuit reversed the district court.\textsuperscript{71} Judge Kearse focused on Judge Pratt's first factor to the exclusion of all others. The court's guiding principle for the application of federal common law was the determination of a significant conflict between a federal policy and the use of state law.\textsuperscript{72} Thereafter, Judge Kearse saw no "identifiable federal policy at stake."\textsuperscript{73}

Next, the court stated that the mere fact that state laws would render different decisions, and, thus destroy uniformity, was an insufficient basis to justify application of federal common law. Judge Kearse cited \textit{Auto Workers v. Hoosier Corp.}\textsuperscript{74} to stress that even under a federal statute calling for federal common law, the Supreme Court has rejected the uniform application of one statute of limitations.\textsuperscript{75} While the court concluded that the federal government has "interests in the welfare of the parties," Judge Kearse saw no federal interest in the \textit{outcome} of the dispute.\textsuperscript{76}

In his strongly worded dissent, Chief Judge Feinberg perceived no basis for Judge Kearse's majority view. Judge Feinberg, citing \textit{Owens v. Haas},\textsuperscript{77} where the Second Circuit held that a federal prisoner, injured by county jail officials working under a federal contract, could use federal common law,

\begin{itemize}
\item\textsuperscript{67} \textit{Id.}
\item\textsuperscript{68} \textit{Id.}
\item\textsuperscript{69} \textit{Id.} at 749.
\item\textsuperscript{70} \textit{Id.}
\item\textsuperscript{71} \textit{In re Agent Orange Prod. Liab. Litig.}, 635 F.2d 987, 993 (2d Cir. 1980), \textit{cert. denied}, 454 U.S. 1128 (1981).
\item\textsuperscript{72} \textit{Id.} (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).
\item\textsuperscript{73} \textit{Id.}
\item\textsuperscript{74} 383 U.S. 696 (1966).
\item\textsuperscript{75} \textit{In re Agent Orange Prod. Liab. Litig.}, 635 F.2d at 994. In \textit{Auto Workers}, the Court decided a suit governed by federal common law pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). Based upon a determination of timeliness of § 301 suits, the Court refused to fill a gap left by Congress because "the teaching of our cases does not require so bold a form of judicial innovation." 383 U.S. at 701.
\item\textsuperscript{76} \textit{Agent Orange}, 635 F.2d at 995.
\item\textsuperscript{77} 601 F.2d 1242 (2d Cir.), \textit{cert. denied}, 444 U.S. 980 (1979).
\end{itemize}
compared the factual circumstances there with the *Agent Orange* features.\(^{78}\)

The dissent expressed disbelief that federal prisoners were afforded the benefit of federal common law while soldiers were not.\(^ {79}\)

The dissent also emphasized the statutory scheme affecting veterans. Just as the *Owens* Court noted the statutes regarding prisoners’ rights as an indication of congressional intent to provide general protections,\(^ {80}\) Judge Feinberg listed numerous statutes providing for veterans’ disabilities and welfare to justify application of federal common law.\(^ {81}\)

Chief Judge Feinberg did not hold that the government’s presence or the soldiers’ role in the suit are required. Instead, he mirrored Judge Pratt’s allusion to *Miree’s* three prong test holding that the use of federal common law depends upon the substantial federal interests, the effect on federal interests through a state law application, and the effect on state interests through a federal law application.\(^ {82}\) *Agent Orange* satisfies these standards.

It is important to note that the plaintiffs called for the use of federal common law based upon subject matter jurisdiction. The issue presented was not the determination of substantive law. Rather, the main issue centered around the plaintiffs’ assertion that the case arose under federal common law. Therefore, one could find fault with the analysis of both the majority and dissent. The majority, while properly respecting the limited jurisdiction of Article III courts, failed to adequately consider the strong case the plaintiffs’ made for the application of federal common law. The dissent, in its focus upon federal common law, ignored the limited jurisdiction of Article III courts.

**B. Agent Orange and Conflict of Laws**

Shortly after the Second Circuit’s decision, the *Agent Orange* case was certified as a class action pursuant to Fed. R. Civ. P. 23(b)(3).\(^ {83}\) As a result,

\(^{78}\) 635 F.2d at 997.

\(^{79}\) *Id.* at 998. ("It is anomalous for this court to hold, on the one hand, that the federal government has an interest in ‘uniform treatment’ of its prisoners sufficient to warrant the use of a federal rule of recovery, and, on the other hand, that the federal government has no such interest in uniform treatment of its soldiers.”). *Id.* (emphasis in original.).

\(^{80}\) *Owens*, 601 F.2d at 1249.

\(^{81}\) *Agent Orange*, 635 F.2d at 997. See e.g., 38 U.S.C. at §§ 310-315 (compensation for wartime disabilities), §§ 321-22 (wartime death compensation for survivors); see also 10 U.S.C. § 121 (1982) (President’s regulatory power), § 3012(b)(1) (the Secretary’s responsibilities for the welfare of the Army).

\(^{82}\) *Agent Orange*, 635 F.2d at 996.

the parties attained complete diversity because only the named plaintiffs and defendants to the suit were subject to the diversity requirements. In addition, the named plaintiffs' claims also exceeded the $10,000 monetary limitation.

In 1983, an important event occurred which shaped the future course of the case. Judge Pratt, the district court judge, was elevated to the Second Circuit leaving the case in the hands of Judge Weinstein. The diversity jurisdiction action left two questions for Judge Weinstein to decide: (1) which state's law would the forum state use, and (2) which particular choice-of-law rules would that state's courts apply.

Judge Weinstein resolved these issues by holding that the question of which state's law applied was unimportant. The essential point he maintained was that any state court "would look to a federal or a national consensus law of manufacturer's liability, government contract defense, and punitive damages" to resolve the conflict.

Even though the Second Circuit had previously ruled that no substantial federal interest was involved, Judge Weinstein distinguished his opinion on two separate grounds. First, he argued that the Second Circuit decision was based only upon jurisdiction and not choice-of-law considerations. Secondly, Judge Weinstein held that circumstances had changed since the Second Circuit opinion which heightened the federal interest. Furthermore, in addressing the Second Circuit's contention that the parties were purely private, the court pointed out that the government was a third-party defendant as to the claims of veterans' wives and children.

Judge Weinstein's role in fashioning national consensus law is soundly criticized for its lack of a proper foundation. The term "national consensus law" does not appear in any federal or state case preceding Agent Orange. It could be argued that Judge Weinstein saw the ends and invented the means. His application of national consensus law, the law that the collective states would apply, avoided the complex choice-of-law mess, but amounted

86. SCHUCK, supra note 49, at 128.
87. Id.
88. Id. at 129 (quoting Agent Orange, 580 F. Supp. at 697).
89. Id. at 697.
90. Id. at 698. Judge Weinstein cited Pub. L. No. 97-72, 95 Stat. 1047 (1981) which amends the Veterans Health Care, Training and Small Business Loan Act of 1981 to authorize the Veterans Administration to provide Agent Orange victims with medical services. Id.
92. A LEXIS search in the Genfed Library for all courts and a similar search in the States Library reveals this fact.
to "rank insubordination." Conversely, Judge Weinstein is often praised for the wisdom of his decision. In his thorough coverage of the Agent Orange case, Professor Schuck finds that Weinstein's role, while testing the bounds of judicial propriety, effectively and equitably balanced the interests of plaintiffs and defendants.

IV. ASBESTOS AND FEDERAL COMMON LAW

The widely disparate statistics concerning the number of asbestos claims is understandable when the chemical's pervasive nature is reviewed. In the 1970's, the United States consumed over 800,000 short tons of asbestos per year. Over three thousand household products contain asbestos including floor tiles, plaster, and insulation. Long-ranging latency periods explain why shipyard workers, truck drivers and their families commonly file claims today after years of exposure. This section focuses upon one asbestos case and the need to uniformly adjudicate asbestos claims.

While asbestos-related claims followed a different legal trail than those involved in Agent Orange, the number of plaintiffs and lawyers involved is equally staggering. The most striking difference between the two mass tort cases is the lack of consolidation in asbestos litigation. This situation did not prevent the Fifth Circuit from waging an analytical war over the virtues and vices of federal common law.

In Jackson v. Johns-Manville Corp., the Fifth Circuit, sitting en banc, held in a 9-5 decision that federal common law could not displace a state punitive damage law. Jackson, the plaintiff, won a substantial punitive damage award in the district court. On appeal, the defendants argued that Mississippi's law governing damages did not apply and that federal

93. SCHUCK, supra note 49, at 130.
94. Id. at 159.
96. Id. at 581.
97. Id.
98. See WILLGING, supra note 4, at 12. Recent estimates of the number of cases range from 30,000 to 50,000. New cases continue to be filed, and Johns-Manville estimates that it will have to pay between $83,000. and $100,000. for personal injury claims as a part of its reorganization. Id. See also T. WILLGING, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES 5-6 (Federal Judicial Center 1985) (despite the view that asbestos cases have become routine products liability disputes, the lack of judicial resources and firm trial dates continues to plague the disposition of claims).
99. 750 F.2d 1314 (5th Cir. 1985) (en banc).
100. Id. at 1326.
101. Id. at 1317. The jury imposed punitive damages against Johns-Manville in the amount of $500,000.
common law sufficed. Ironically, in the *Agent Orange* dispute, the plaintiffs argued for the application of federal common law. Faced with the punitive damage law of many jurisdictions, defendant Johns-Manville argued for the application of federal common law.

Just as the Second Circuit acknowledged the national scope of *Agent Orange*, the Fifth Circuit did the same with this asbestos case.\(^\text{102}\) The defendants feared that the imposition of punitive damages would destroy their ability to adequately compensate future victims.\(^\text{103}\) Such payments would "require asbestos companies to expend their resources at a more accelerated pace to the detriment of future plaintiffs."\(^\text{104}\)

In response to the defendants' call for the application of federal common law, the court refused their request on the grounds that a mere conflict over a "common fund or scarce resources" did not create sufficient interstate conflicts.\(^\text{105}\) Judge Randall, writing for the majority, pointed out that substantial federal interests are not implicated in the absence of express congressional policy or an effect upon the federal authority and duties of the United States.\(^\text{106}\)

The court also refused to assert federal judicial power merely because justice impelled its application.\(^\text{107}\) Judge Randall feared such an action would erode *Erie*'s constitutional underpinnings. Also, the court viewed the application of federal common law as opening the floodgates for its application to other legal problems without principle.\(^\text{108}\)

Chief Judge Clark's dissent unequivocally rejected the majority's view that "justice is too abstract, too all-encompassing a concept to serve as a basis for state substantive law in diversity cases."\(^\text{109}\) The dissent accused the court of giving short shrift to the unprecedented volume of asbestos litigation in the federal courts.\(^\text{110}\) Judge Clark also noted that three asbestos companies entered Chapter 11 reorganization bankruptcy proceedings.\(^\text{111}\) Furthermore, the inconsistent implementation of state punitive damages law would cause "disproportionate awards, consum[ing] the only assets available
to compensate late-filing but equally deserving plaintiffs." The dissent reminded the majority of Chief Justice Burger's holding in *Miree* which stated that federal common law is not precluded in all matters involving private litigants. Judge Clark also called for judicial action which would draw congressional attention to the problem. Lastly, the dissent reiterated the need to submit certified questions to the Supreme Court to address these complex issues.

V. FEDERAL COMMON LAW AND THE MASS TORT

*Erie*’s failure is the doctrine’s strict application to the complex area of mass tort law. The fathers of that doctrine could not have foreseen the uniqueness and complexity of the mass tort case. *Erie* involved a single plaintiff against a lone defendant. Mass tort cases are not as simple. The historical basis of *Erie*, the Court’s distaste for federal common law preemption of state law, are not germane to the mass tort case. State law lacks the sophistication needed to address the complexities of mass tort litigation and to this date has not done so.

This author acknowledges that while it is convenient to simply throw federal common law into the morass, it is more important to establish the nexus between well-settled criteria for applying federal common law to the unique characteristics of the mass toxic tort.

It is thus essential to this proposal to draw from the definition of federal common law in Part II of this Comment and from the cases cited in Parts III and IV of this Comment to establish a sound constitutional and statutory basis for the application of federal common law.

The Supreme Court has held that federal common law essentially falls within two areas. First, the Court acknowledges the importance of protecting "uniquely federal interests." Secondly, the Court looks for an implicit or explicit congressional permit to the federal courts to make substantive

112. *Id.* at 1330.
113. *Id.* at 1331.
114. *Id.* at 1333.
Punitive damages are awarded to punish a defendant for his actions and to set an example for potential wrongdoers. In the mass toxic tort context, punitive damages are especially necessary because of extreme toxic chemical exposure presents danger to the public welfare. Conversely, a single plaintiff should not receive punitive damages to the detriment of other similarly situated plaintiffs' needs for compensatory damages. Rather, all similarly situated plaintiffs should receive a market share from a lump-sum award. Punitive damages do not deter or punish if the defendant becomes insolvent and subsequently cannot cover its compensatory obligations to injured plaintiffs. Therefore, mass toxic tort cases require a mandatory class action on the issue of punitive damages pursuant to Fed. R. Civ. P. 23(b)(1)(B). While, the class action device is not the best method to apply, it is, however, the only available tool which the courts may presently employ. Furthermore, class certification with an opt-out clause is appropriate for other issues such as compensatory damages and causation.

In Agent Orange, Judge Weinstein applied the limited fund theory in certifying the class for punitive damages. That litmus test evaluates the substantial probability that the combination of punitive and compensatory damages will exceed the defendant's assets. On the surface, the test gives

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118. Id.
119. BLACK'S LAW DICTIONARY 352 (5th Ed. 1979) (Punitive damages are "awarded to the plaintiff over and above what will barely compensate him for his property loss ... to punish the defendant for his evil behavior or to make an example of him.") Id. See RESTATEMENT (SECOND) OF TORTS § 908(1)(1979).
120. See In re Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 725 (1983)("The Paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund ... and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.") (quoting A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 45 (1977)).
121. The Advisory Committee's notes state:
A mass accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action certification because of the likelihood that significant questions, not only of damages but of liability and defenses to liability would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.
122. 100 F.R.D. at 725.
123. Id. A more contemporary opinion today is that of Judge Friendly in Roginsky v.
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the appearance of an easy escape for defendants. In practice, however, the application of the theory involves a detailed review of the defendant's balance sheets, and a calculation of potential claims. The courts should apply the limited fund theory test in the interest of similarly situated plaintiffs and latent claims.

The mere certification of a mandatory class of those seeking punitive damages does not hurdle the choice-of-law problems. Choice-of-law rules provide various standards for punitive damages. Judge Clark points out that "[a]side from the inequity resulting from the fact that some states do not permit such awards, they carry the seeds to ultimately defeat the basic purpose of product liability law." A federal common law proclaiming one uniform rule for the amount of punitive damages, as well as an equal distribution among plaintiffs similarly affected by the same chemical, is fundamentally fair.

An argument may be raised that the mass toxic tort case poses problems no different from other tort cases involving punitive damages. That is untrue. If only a few plaintiffs suffered the affects of toxic chemicals, the solutions raised here would be baseless and unnecessary. Mass toxic torts, however, involve thousands of potential claimants. The numbers alone are cause to offer other remedies.

B. Choice-of-Law and Federal Common Law

Choice-of-law rules impede the fair adjudication of claims. In Agent Orange, the parties spent millions of dollars and wasted much time determining the applicable law. Klaxon Co. v. Stentor Elec. Mfg. Co. held that a federal court sitting in diversity must apply the choice-of-law rules of that state. Most choice-of-law rules mandate the application of the law of each plaintiff's jurisdiction. In the mass tort context, some commentators liken this to requiring a trial judge to enroll in fifty different courses, studying each

Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967): "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Quoted in Seltzer, Punitive Damages In Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 FORDHAM L. REV. 37, 53 (1983). Professor Seltzer's article offers other solutions to the punitive damages problem.

125. See Mullenix, supra note 116, at 1076 ("Choice-of-law problems significantly increase the complexity, expense and duration of mass-tort-litigation. . . . After the applicable law is determined the lawsuit can grind to a halt while the court determines whether to apply state or federal rules to a particular legal question."). Id.
126. 313 U.S. 487 (1941).
state's tort law, and requiring correct application of each state's law on the final exam.\textsuperscript{127} Situations such as these dictate the need for one uniform federal common law.

In \textit{Agent Orange}, after the Second Circuit refused subject matter jurisdiction based upon federal common law, the plaintiffs' amended complaint asserted diversity jurisdiction. Faced with complex choice-of-law problems, Judge Weinstein declared a "national consensus law" because "each state would probably apply the same law, that is to say either federal or national common law."\textsuperscript{128} Judge Weinstein's logic has been soundly criticized.\textsuperscript{129} In truth, no national consensus existed among the various state laws governing product liability and punitive damages.

There are four common choice-of-law rules: governmental interest, Leflar, \textit{lex loci delicti}, and comparative impairment.\textsuperscript{130} The governmental interest rule involves the forum state's choice of other state law where sufficient contact between the plaintiff and another state is established.\textsuperscript{131} Since the contact amounts to a mere residency requirement, the rule cannot be used to address the mass tort problem. The Leflar approach chooses the "better law."\textsuperscript{132} This rule fails in light of the Supreme Court's recent holding in \textit{Phillips Petroleum Co. v. Shutts}.\textsuperscript{133} There, the Court held that a Kansas state court lacked sufficient interest to adjudicate the claims of nonresident plaintiffs under Kansas law.\textsuperscript{134} The traditional \textit{lex loci delicti} rule follows the law of the state in which the court establishes "the last event necessary to make an actor liable for an alleged tort."\textsuperscript{135} For obvious reasons, this rule is impossible to apply in the mass toxic tort case. Finally, the

\textsuperscript{127} Miller & Crump, \textit{Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts}, 96 \textit{YALE} L.J. 1, 64 (1986). \textit{See also Agent Orange}, 580 F. Supp. at 695 (Weinstein, J.) ("Since this is a diversity jurisdiction case . . . this court . . . sits much as a state trial court would in New York, applying New York substantive law except when . . . a New York court would look to substantive law other than New York's in deciding what substantive law would apply.").

\textsuperscript{128} \textit{Agent Orange}, 580 F. Supp. at 693.

\textsuperscript{129} \textit{See} Miller & Crump, \textit{supra} note 127, at 65-66 ("[T]he application of uniform law is a legitimate policy choice that is better approached in a direct and honest way than through the subterfuge of simply fudging differences among state laws to reach a disingenuous conclusion that they are 'all the same.'"); \textit{see also SCHUCK, supra} note 49, at 128-30 ("Weinstein's imaginative effort to neutralize the Second Circuit's decision and thus gain freedom to fashion a better rule, then, was ultimately unpersuasive.").

\textsuperscript{130} \textit{See Note, Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse}, 96 \textit{YALE} L.J. 1077, 1081 (1987) [hereinafter Note, \textit{Mass Tort Litigation}].

\textsuperscript{131} \textit{Id.} at 1082.

\textsuperscript{132} \textit{Id.} at 1083.

\textsuperscript{133} 472 U.S. 797 (1985).

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{See RESTATEMENT OF LAW OF CONFLICT OF LAWS} §§ 377-379 (1934).
comparative impairment rule attempts to balance each state's interests.\textsuperscript{136} Again, in the interest of time, equity, efficiency and conservation of judicial resources, federal common law would apply one standard for plaintiffs and defendants.

Choice-of-law problems also highlight the pre-existing interstate nature of mass tort cases. The Court's decision in \textit{Hinderlider} approves the application of federal common law. \textit{Hinderlider} involved an interstate dispute over the apportionment of water. The case represents the problems which exist when "conflicting state interests make the use of either state's law inappropriate."\textsuperscript{137} Mass tort cases present the same conflict. The lack of federal common law causes a "nationwide competition for scarce assets."\textsuperscript{138}

It is contended, in this Comment, that in \textit{Agent Orange} and in similar mass tort cases, federal common law should apply. The problems are sufficiently national in scope and exhibit a significant conflict between a federal policy and state law. Federal policy in the area of toxic products is subject to extensive congressional regulation and policy.\textsuperscript{139} The large body of environmental and toxic products law evidences a substantial federal interest. Further, it would seem that the thousands afflicted by asbestos are viewed as a national concern.

One of the stronger proposals for the implementation of federal common law calls for development of a federal mass-tort procedure act.\textsuperscript{140} By isolating those problems unique to mass tort cases, such an act would recognize that "[t]he time is propitious for a mass-tort procedure act tailored to the needs of victims, defendants and society."\textsuperscript{141}

In the absence of such a statute, the courts should not wait for the existing congressional impasse to be broken.\textsuperscript{142} Many commentators foresee the dangers and inequities which will flow from disproportionate and conflicting state laws. The application of federal common law would allow the courts to quickly bypass the lengthy and expensive process of determining the appli-

\textsuperscript{136} See Note, \textit{Mass Tort Litigation}, supra note 130, at 1084.
\textsuperscript{137} \textit{Johns-Manville}, 750 F.2d at 1331.
\textsuperscript{138} \textit{Id.} at 1332.
\textsuperscript{139} See, e.g., supra note 5.
\textsuperscript{140} See Mullenix, supra note 116, at 1077. Section 9 of Professor Mullenix's proposed Act states that:

\begin{quote}
[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the rights and duties of parties to mass tort class action litigation, pursuant to this Act, shall be governed by principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.
\end{quote}

\textit{Id.} at 1095.
\textsuperscript{141} \textit{Id.} at 1089.
\textsuperscript{142} \textit{Johns-Manville}, 750 F.2d at 1333.
cable law.\textsuperscript{143}

VI. CONCLUSION

This Comment proposes the application of federal common law for mass toxic tort product liability cases. Respect for the \textit{Erie} principles is shown by a thorough examination of its history and development. While federal common law should be used sparingly, mass toxic tort litigation provides a setting unique to \textit{Erie}'s factual basis. While it is important to defer to state interests, federal common law acts interstitially to fill gaps and provides fair adjudication in the absence of a well-developed body of state law geared toward answering the needs of plaintiffs, defendants and the courts.

\textit{Francis V. Kenneally}

\textsuperscript{143} See Weinstein, \textit{The Role of the Court in Toxic Tort Litigation}, 73 GEO. L.J. 1389, 1391 (1985) (stating "[w]e do not now have a method of determining the controlling law.").