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The Agent Orange Litigation: Should Federal Common Law Have Been Applied?

Lindsey How-Downing*

INTRODUCTION

"To the non-legal mind, it would be an odd proposition indeed that this litigation, so patently of national scope and concern, should not be tried in federal court."¹ So spoke U.S. Court of Appeals Chief Judge Feinberg in dissenting from the Second Circuit's dismissal, for lack of subject matter jurisdiction, of a class action against the manufacturers of Agent Orange.

The "national scope and concern" of the litigation is obvious. The plaintiffs, hundreds of Vietnam veterans and their families from several states,² claimed the veterans had been injured by exposure to Agent Orange, a herbicide sprayed in Vietnam during the war.³ The veterans also claimed they were at risk of future injury⁴ from exposure to toxic organic chemicals, including dioxin, in Agent Orange.⁵ They did not specify damages⁶ but suggested that because of the potential size of the plaintiff class (possibly 2.4 million veterans and their families),⁷ dam-

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1. In re "Agent Orange" Prod. Liability Litigation, 635 F.2d 987, 996 (2d Cir. 1980) (Feinberg, C.J., dissenting).
2. Several substantially identical actions were commenced in the Northern District of Illinois and the Southern and Eastern Districts of New York and were later consolidated and transferred to the Eastern District of New York. At the time of the district court decision there were more than 800 named plaintiffs. Id. at 988.
3. Agent Orange was an approximately 50:50 mixture of the n-butyl esters of 2,4-D ([2,4-dichlorophenoxy acetic] acid). The name "Agent Orange" derives from the orange band painted on the containers in which the herbicide was transported. See Herbicide Agent Orange: Hearing Before the Subcomm. on Medical Facilities and Benefits of the House Comm. on Veterans Affairs, 95th Cong., 2d Sess. 4 (1978).
4. "At risk" generally means that one has the potential for developing a particular injury, such as cancer or genetic damage. 635 F.2d at 996.
5. The herbicide allegedly was contaminated with 2,3,7,8-tetrachloro-dibenzo-p-dioxin (dioxin) and other toxic chemicals. Plaintiffs asserted that dioxin is one of the most toxic man-made substances ever developed. Id. at 989.
6. 635 F.2d at 989. "The third amended complaint alleges no specific ad damnum. The second amended complaint, however, asserted damages 'in the range of $4 billion to $40 billion.'" Id. at 989 n.5.
7. Id. at 989.
ages would exceed the combined liquid assets of the defendants, a group including many major American chemical manufacturers. Plaintiffs sought to create a trust fund with funds from the defendants' current earnings in order to satisfy all individuals within the plaintiff class.

Although such a description of the case might convince a layman that the case could properly be brought in a federal court, it would not convince a judge. Grounds for federal jurisdiction must be alleged. Plaintiffs alleged that federal question jurisdiction existed under either federal common law or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The district court rejected plaintiffs' attempt to ground jurisdiction in FIFRA but recognized a cause of action under federal common law. The Court of Appeals reversed, and the Supreme Court denied certiorari.

This Comment will argue that because of the national scope of the Agent Orange problem and the inadequacy of alternative remedies, federal common law should have been applied in the Agent Orange

8. Id.
10. 635 F.2d at 989. Plaintiffs also sought a permanent injunction against the manufacture of Agent Orange. Id.
11. Plaintiffs premised jurisdiction on 28 U.S.C. § 1331(a) (1976), which provides that: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitutional, laws, or treaties of the United States." 635 F.2d at 988.
14. Plaintiffs had argued that although FIFRA does not specifically provide civil remedies, nevertheless, it is manifest that such laws establish regulatory schemes within the context of which it is intended that a remedy be fashioned by the courts. The court found that there was clear indication that Congress had intended not to allow private suits under FIFRA. 506 F. Supp. at 741-42.
15. Id. at 743-49.
16. 635 F.2d at 987, 988, cert. denied, 452 U.S. 958 (1981). This did not end the attempt to try the case in federal court. Following the second Circuit's opinion, the district court proceeded with the case on diversity of citizenship grounds. 506 F.Supp. at 782-83 n.30. This approach, however, presents certain difficulties. Federal courts sitting in diversity apply state statutes of limitation. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). Therefore, the court requested briefs from counsel on the applicable law of all 50 states. 506 F. Supp. at 799. In some 17 states, where the statute runs from the time of injury, veterans may be barred completely. N.Y. Times, Nov. 30, 1980, § 4 at 6, col. 6. Other states may not have sufficiently developed their products liability law so as to allow any action to proceed. See Tybor, Agent Orange: A Red Alert, Nat'l L.J., Oct. 13, 1980, at 1, col. 2.

The case will be tried in three stages. The first stage will determine whether "war contractors" may claim immunity because they were following government specifications. If plaintiffs prevail, a second trial will determine the liability issue. Should plaintiffs prevail once again, damages will be determined in a third trial. 506 F. Supp. at 786-87.
litigation. The first part of this Comment describes the history of the federal common law doctrine, noting the areas where use of judicially created federal common law is considered appropriate by the current Supreme Court. Part II reviews the Agent Orange litigation and then considers the Second Circuit's holding that federal common law should not apply, finding logical inconsistencies in the court's reasoning and inaccurate application of precedent. This Comment concludes by assessing the probable effect of the decision on the continuation of the plaintiffs' suit, and the future of federal common law in general.

I. EVOLUTION OF FEDERAL COMMON LAW

A. The Constitutional Source of Federal Common Law

Federal courts have never been able to apply federal common law to every case that comes before them.17 Section 34 of the Judiciary Act of 1879 provided that "[t]he laws of the several states, except where the constitution or treaties, or Acts of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply."18 In 1842, in Swift v. Tyson,19 the Supreme Court held that the "laws of the several states" contemplated by the Act did not include decisions of state courts.20 The Court also stated, however, that federal courts could create common law only in matters of "general" law, dealing with "general principles and doctrines of commercial jurisprudence."21 State law governed matters of a "local" nature, such as the construction of state statutes and decisions affecting immovable property.22

Swift v. Tyson was followed for almost one hundred years.23 Then, in 1938, the Supreme Court, in Erie Railroad v. Tompkins,24 declared that there is no "federal general common law" and established the principle that state law should be followed by federal courts in diversity cases "except in matters governed by the Federal Constitution or by

20. Id. at 17.
21. Id. at 19.
22. Id.
24. 304 U.S. 64 (1938).
Acts of Congress." Succeeding courts interpreted this to mean that state law was the rule of decision in federal courts unless the Constitution or a specific federal statute mandated the use of a federal decisional rule.

However, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, decided the same day as *Erie*, indicated that federal common law in some form had survived. Justice Brandeis, author of the *Erie* opinion, also wrote *Hinderlider*, which declared that apportionment of water between two states presented "a question of ‘federal common law’ upon which neither the statutes nor the decisions of either state can be conclusive."

Though Brandeis did not expand on why the result in *Erie* should differ from that in *Hinderlider*, an examination of *Hinderlider*’s unique factual setting makes it clear. *Erie* involved litigation over an alleged tort. In *Hinderlider*, the dispute centered on the validity of a compact between two states apportioning water rights in a river running through both states. Neither state had complete sovereignty over the matter. The only governing body that did was the federal government. In such a case, where a federal rule must of necessity be applied, and no relevant federal legislation exists, a federal court must formulate common law.


27. 304 U.S. 92 (1938).

28. Id. at 110.

29. 304 U.S. at 69.

30. Though a compact between New Mexico and Colorado was at issue, jurisdiction in the Supreme Court was based on federal common law, not the compact. 304 U.S. at 110-11. Congress had consented to the compact, but the Supreme Court ruled that such assent did not make the compact a "statute of the United States" within the meaning of the jurisdictional statute covering appeals from a state court to the Supreme Court. Id. at 109. The Supreme Court sidestepped the question of whether the compact would have provided a basis for certiorari. Id. at 110 n.12. See *Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1074-76 (1967).

31. 304 U.S. at 110.


Although federal law applies to disputes between states, *see Nebraska v. Wyom ing*, 325 U.S. 589, 616 (1945), *Hinderlider* does not require the states themselves to be parties to the
1. Rights and Duties of the United States

In *Clearfield Trust Co. v. United States*, decided in 1943, the Supreme Court identified another area where the Constitution authorizes federal common law. *Clearfield* presented the question of whether state or federal law should govern an action by the United States to recover on a government paycheck that had been fraudulently cashed. The Court held that federal law governs the rights and duties of the United States on commercial paper it issues. The authority to issue the check came from the Constitution and federal statutes and was, the Court stated, "in no way dependent on the laws of Pennsylvania or any other state". Since the "duties imposed upon the United States and the rights acquired by it as the result of the issuance [of commercial paper] find their roots in the same federal sources," a federal rule must govern disputes regarding those rights and duties. In the absence of applicable federal legislation, that federal law must be fashioned by the courts. The Court found that although state law may be selected as the federal rule of decision, the application of state law in *Clearfield* would be adverse to federal interests because it "would subject the rights and duties of the United States [on its commercial paper] to exceptional uncertainty" and make "identical transactions subject to the vagaries of the laws of the several states." The "desirability of a uniform rule" was clear, the Court concluded.

The *Clearfield* doctrine also applies to tort cases. In *United States v. Standard Oil Co.*, the Court held that the liability of a private party for injuring a soldier was within the province of federal law. In *Standard Oil*, the United States sued to recover money paid for hospitalization and wages of a soldier injured by the defendant's employee. The

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33. 318 U.S. 363 (1943).
34. *Id.* at 365-66.
35. *Id.* at 366.
36. *Id.*
37. *Id.*
38. *Id.* at 367.
39. *Id.*
40. *Id.*
41. 332 U.S. 301 (1947).
42. *Id.* at 305-06. The *Clearfield* principle was also applied in the following tort situations: Howard v. Lyons, 360 U.S. 593, 597 (1959) (defense to defamation of military officers); Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948) (liability of carrier for one riding on a free pass governed by federal law); United States v. Sommerville, 324 F.2d 712, 714-16 (3d Cir. 1963), *cert. denied*, 376 U.S. 909 (1964) (conversion of security interest in FHA loans).
43. Although the injured soldier had released the defendant from any claims on his
Court stated that the scope, nature, legal incidents, and consequences of the relationship between members of the armed services and the government are fundamentally derived from federal sources, and are therefore to be governed by federal authority. This authority, the Court concluded, includes the right to protect the relationship from harm inflicted on it by others. The Standard Oil Court, however, declined to create a new cause of action allowing the government to recover for loss of a soldier's services, preferring to leave such a step to Congress.

The Court indicated that to determine whether or not state law is to control, courts should assess considerations relevant to specific governmental interests involved and how application of state law would affect them. These considerations include the need for uniformity and inferences properly to be drawn from the failure of Congress in failing to take affirmative action.

2. Federal Common Law Where the United States Is Not a Party

The government need not be a party to an action for federal common law to be the appropriate governing law. Although the government was a party in some of the early cases justifying the creation or application of federal common law based on the effect of the suit on the government's rights and duties, the holding in Clefield was based upon the federal nature of the function involved rather than upon the fact that the government was a party to the litigation.

The Court applied the principles developed in Clefield to suits between private parties in Bank of America National Trust & Savings Association v. Parnell, a suit concerning defective title to bearer bonds...
backed by the United States. The Court found that there was only a "speculative," "remote" possibility that the federal government had any interest at all in the litigation, which did not involve the "rights and obligations created by the Government bonds themselves." Application of federal law to transactions "essentially of local concern" was unjustified, the Court held. The Court stated, however, that "[w]e do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties . . . ." Thus, to determine whether federal common law may be applied, courts must look at the extent to which the dispute implicates the rights and liabilities of the United States.

B. Acts of Congress As A Basis For Federal Common Law

When Congress has enacted a statute providing the substantive law in an area, federal courts have been willing to develop a federal common law to fill any gaps in the legislative scheme. The statute need not even specifically prescribe a federal rule of decision; authority to create a federal common law rule may be implied by a policy expressed in a federal statute.

51. Id. at 33-34.
52. Id.
53. Id. at 34.
54. See, e.g., Carlson v. Green, 442 U.S. 14 (1980), where the mother of a deceased prison inmate brought suit against federal prison officials, alleging violation of constitutional rights. The Court affirmed a Seventh Circuit opinion that federal common law, not state survivorship and wrongful death laws, applied. Even though the United States was not a party to the litigation, the action arose under the Constitution, so federal law was appropriate, as only a uniform federal rule would protect against repetition of the conduct. Id. at 23-24. See also Ivy Broadcasting Co. v. American Tel. and Tel. Co., 391 F.2d 486 (2d Cir. 1968) (federal common law provides remedy for tort and breach of contract in cases involving telephone companies).
55. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (some legal problems "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").
56. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 457-58 (1942). The courts' willingness to apply federal common law has also been important in the realm of labor law.
Federal common law has thus been used to resolve questions in suits brought pursuant to federal statutes because *Erie* "is inapplicable to those areas of judicial decisions 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 . . . ."57 The problem is usually one that is not covered by the specific provisions of any statute but that has some relation to the policies underlying some congressional enactments. Frequently, such a case arises from or bears heavily on an area that is federally regulated.58 As the Court in *United States v. Little Lake Misere Land Co.* 59 noted, "[t]here will often be no specific federal legislation governing a particular transaction . . . but silence . . . in the federal legislation is no reason for limiting the reach of federal law. . . . To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."60

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60. *Id.* at 593.
C. Limits on Application of Federal Common Law

1. Insufficient Federal Interest

The mere assertion of a federal interest—even one so important as the fiscal interest pointed out in *Clearfield*—does not preclude the application of state law. The Supreme Court first made this clear in *Parnell*, where although the Court conceded that the federal government might have an interest in a suit between private parties, it held that private contractual relations with respect to federal commercial paper are governed by state law absent some showing that a federal interest preempts state law.61 Similarly, in *Wallis v. Pan American Petroleum Corp.*,62 the Court confined the application of federal common law in suits between private parties to instances in which a significant conflict exists between federal interest and state law.63

Later the Court extended this principle to cases where the United States is a party. In *United States v. Yazell*,64 the Court held that for a fiscal interest of the national government to override state interests, the federal interest must be clear, substantial, and incapable of being served consistently with state interests. Further, the interest must be in danger of suffering major damage.65 Where such a federal interest is not involved, state law is to be applied.

In its most recent analysis of the issue, in 1977, the Supreme Court reaffirmed its policy of limiting the applicability of federal common law in suits between private parties. In *Miree v. DeKalb County*,66 petitioners, survivors of passengers killed in an airline crash, sued the county claiming that it had breached a contract with the Federal Aviation Administration to the detriment of petitioners, third party beneficiaries of the contract.67 Petitioners contended that federal common law should apply because of the United States' "substantial interest in

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63. *Id* at 68. *Wallis* involved a dispute concerning oil and gas leases issued by the United States. The Court held that any federal interest in private disputes regarding these leases was highly abstract and state law has not been shown inadequate to achieve the interest. *Id* at 71. While noting that a federal statute dealing with the general subject would be a starting point for federal common law, the Court held that when nothing in the relevant act conflicted with state law, state law would be applied. *Id* at 68-69. The Court held that it was not enough that Congress could have preempted state law; since the Court found no inconsistency between federal and state law, state law was adequate to protect whatever federal interest existed. *Id* at 68.
64. 382 U.S. 341 (1966).
65. *Id* at 352. The Small Business Administration sought repayment of a "disaster loan" signed by both Mr. and Mrs. Yazell. The Court held that state coverture law applied, thus insulating Mrs. Yazell's separate property from levy of execution. *Id* at 343. Justice Black dissented, citing a lack of uniformity that would result in chaos. *Id* at 359-60.
67. *Id* at 27. Petitioners also sued the United States under the Federal Tort Claims Act, but the Court held that the claim did not affect the question of whether federal common
regulating aircraft travel and promoting air travel safety," but the Court, citing *Wallis*, said that whether or not to displace state law was a decision for Congress. The Court noted that Congress had rejected a bill that would have created a federal cause of action for claims arising out of aircraft disasters.

2. **Comprehensive Federal Legislation**

As discussed above, federal courts can fashion common law to fill the gaps in an incomplete statutory scheme. But in a field where Congress has intended that its legislation be comprehensive, courts may not develop new federal common law. The question for the courts then is whether Congress has directly addressed the issue. For example, in *Mobil Oil Corp. v. Higginbotham*, the Supreme Court refused to provide damages for "loss of society" under the general maritime law when Congress had not provided such damages in the Death on the High Seas Act. Although Admiralty courts were often called

law should apply to third party beneficiaries of the contract between the FAA and the county. *Id.* at 26-29 nn.1-4.

68. *Id.* at 31.

69. *Id.* at 32.

70. *Id.* at 32 n.5. In another portion of the opinion the Court stated "[t]he question of whether petitioners may sue respondent does not require decision under federal common law since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome." *Id.* at 31. The Court suggested that in the right context federal common law would apply "in interpreting the rights and duties of the United States under federal contracts." *Id.* But the Court held that this was not the right context since federal "operations would [not] be burdened . . . by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts." *Id.* at 30.

This language in the majority opinion and the majority's use of *Wallis* elicited a concurrence from Chief Justice Burger. The Chief Justice warned that the majority opinion might be wrongly interpreted to mean that federal common law could only be created where the rights and duties of the federal government were at issue. *Id.* at 34 (Burger, C.J., concurring). He suggested the "possibility that there may be situations where the rights and obligations of private parties are so dependent on a specific exercise of congressional regulatory power that 'the Constitution or Acts of Congress 'require' otherwise than that state law govern of its own force.'" *Id.* at 34-35 (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-93 (1973)). In such a situation the Chief Justice would not read *Wallis* as precluding a choice of 'federal common law' simply because there is no specific federal legislation on point. *Id.* at 35. Rather, where federal law must govern the courts should be allowed to fill in the gaps in federal legislation. *Id.*

71. See notes 55-60 and accompanying text.

72. See Note, *Federal Common Law in Government Actions for Tort*, 41 ILL. L. REV. 551, 552-53 (1941) ("whenever Congress has 'occupied the field' has, that is, by statutory enactment evidenced an intention to deal exclusively with the subject matter of the regulation, matters arising within the field or having some substantial relation to the policy sought to be effected by the regulation will be determined by federal decisional law even though the matter is not covered by specific statutory provision. [footnotes omitted]").

73. 436 U.S. 618 (1978). Speaking for the majority, Mr. Justice Stevens wrote that "[t]here is a basic difference between filling in a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* at 625.
upon to supplement maritime statutes because Congress had not enacted a comprehensive maritime code, Congress had spoken directly to the question of damages, and the Court could not address the issue.

Congress may not only preclude the courts from developing new federal common law, but can also preempt existing federal common law. In *City of Milwaukee v. Illinois*, the State of Illinois sued Milwaukee in federal court for damage to Lake Michigan allegedly caused by the overflow of untreated sewage from the city's sewer system. The claim was brought under the federal common law of nuisance. The Supreme Court declared that the 1972 amendments to the Federal Water Pollution Control Act (FWPCA) eclipsed the federal common law of nuisance for interstate waters. Writing for the majority, Justice Rehnquist stated that federal courts should rely on federal common law only when "compelled to consider federal questions which cannot be answered from federal statutes alone." But when Congress "does speak directly to a question," federal courts are not free to supplement the congressional answer.

74. *Id.* at 625. In Carlson v. Green, 446 U.S. 14 (1980), however, the Court held that a tort action for constitutional violations by federal officials was not precluded by the Federal Torts Claims Act because Congress had explicitly stated the circumstances where it intended the Act to be exclusive and had not barred remedies for constitutional torts. *Id.* at 19-20.


76. *Id.* at 1787-88.

77. Milwaukee and Illinois had argued the case before the Supreme Court nearly a decade earlier. The Court avoided reaching the merits of the dispute by declaring Milwaukee, a political subdivision of the state of Wisconsin, a citizen of Wisconsin ineligible to appear under the Court's exclusive jurisdiction over controversies between states. Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972). The Court stated that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103. The suit was remitted to federal district court. See *id.* at 98-101.


79. 101 S. Ct. at 1790 (quoting D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring)).

80. *Id.* at 1791 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)). According to Justice Rehnquist, whether a statute is preemptive depends on "an assessment of the scope of legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* at 1791 n.8.

The *City of Milwaukee* holding that the FWPCA preempted federal common law with regard to interstate waters was extended to coastal waters in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2627 (1981). The Court in *Sea Clammers* also refused to infer a private right of action because it found that the structure of the Act and its legislative history clearly indicated that Congress had not intended the federal courts to fashion supplemental remedies. *Id.* at 2625. See Note, *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 10 Ecology L.Q. 39 (1982).

In *Sea Clammers*, the Supreme Court continued a trend toward interpreting Congressional legislation as a barrier to the grant of supplemental remedies by the federal courts. In 1979 the Court refused to imply a private right of action under Section 17(a) of the Securities Exchange Act of 1934 or to consider whether an implied private remedy was necessary to effectuate Congress' intent. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). Where the legislative history does not speak to the issue of private remedies, the Court held, none may be inferred by the courts. *Id.* at 575-76. Similarly, in Texas Indus. v. Radcliff
D. The Current Status of Federal Common Law

Federal common law has survived *Erie* in at least two classes of cases: suits affecting the rights and liabilities of the United States under the Constitution, and suits involving non-comprehensive federal statutes or regulations. Courts may create federal common law only if there is an overriding interest in a uniform rule of decision, or if a clear and substantial interest of the federal government is inconsistent with state interests and will suffer serious damage if state law is applied. If Congress passes comprehensive legislation, existing federal common law is revoked, and courts will fashion no common law in that area without a clear indication that Congress so intended.

II. THE AGENT ORANGE LITIGATION

A. The Case History

1. The District Court Opinion: a Federal Interest in Protection of Soldiers

The Agent Orange cases were consolidated as a class action before Judge Pratt of the Eastern District of New York in 1979. The district court applied a three-pronged analysis, derived from *Miree v. DeKalb* and *Wallis v. Pan American Petroleum*, to determine whether federal common law would govern plaintiffs' claims. The court considered three factors: (1) the existence of a substantial federal interest in the outcome of the litigation; (2) the effect on the federal interest should materials, 101 S. Ct. 2061 (1981), the Court ruled that the federal judiciary was not free to fashion a rule of contribution in antitrust actions. Writing for a unanimous Court, Chief Justice Burger stated that the decision to create such a rule of law must be based on consideration of the policies behind antitrust and should be made by Congress, not a court. *Id.* at 2070. Given Congressional silence, the Chief Justice concluded that federal courts lack the power to provide a federal remedy. *Id.* See also *Northwest Airlines v. Transport Workers Union*, 101 S. Ct. 1571 (1981) (refusing to recognize right of contribution in Title VII cases); *California v. Sierra Club*, 451 U.S. 287 (1981) (no private remedy under Section 10 of the Rivers and Harbors Appropriation Act of 1879 without explicit instructions from Congress). In *Texas Industries* the Chief Justice did suggest that Congress may have meant that there be no right of contribution because, when the Sherman Act was passed, there was no such right at common law. 101 S. Ct. at 2069 n.17. *Cf.* *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748, 2758 (1981) (congressional silence interpreted to incorporate the common law rule of damages at the time of enactment).

state law be applied; and (3) the effects on state interests should state law be displaced by federal common law.88

Judge Pratt found "substantial federal interests at stake"89 because soldiers serving in the armed forces are government charges. Torts committed against them by war contractors interfere with the relationship between the soldiers and the government, implicating the federal interests in the members of the armed forces identified in Standard Oil.90 The court also found a federal interest in the rights of the war contractors in the Agent Orange litigation because the contractors' liability might affect future dealings between the contractors and the government.91

The court distinguished Miree on its facts, noting that the Supreme Court had refused to apply federal common law because it found that contractual relations between the FAA and municipalities would not be burdened by applying varying state standards to suits by third party beneficiaries of such contracts.92 "In contrast," wrote Judge Pratt, "government relations with war contractors might well be drastically altered by changes in the rules governing liability of war contractors to soldiers for injuries caused by inherently 'dangerous' war materials."93

The court did not claim that a substantial federal interest would be present in every product liability suit brought by a veteran against a war contractor. Rather, Judge Pratt focused on the magnitude of the Agent Orange litigation, finding that the number of veterans involved and the size of the claims enhanced the federal interest in the litigation because the enormity of the potential liability—"millions to billions of dollars," according to the court—could affect the contractors' relations with the government.94 The court also suggested that the "thousands to millions" of veterans potentially involved in the litigation might justify

88. 506 F. Supp. at 746.
89. Id. at 746.
90. To support his conclusion Judge Pratt quoted from Standard Oil:

Perhaps no relation between the Government and a citizen is more distinc-
tively federal in character than that between it and members of its armed forces.
To whatever extent state law may apply to govern the relations between soldiers or
others in the armed forces and persons outside them or non-federal governmental
agencies, the scope, nature, legal incidence and consequences of the relation be-
tween persons in service and the government are fundamentally derived from fed-
eral sources and governed by federal authority [citations omitted]. So also we
think are interferences with that relationship such as the facts of this case involve.
For, as the Federal Government has the exclusive power to establish and define the
relationship by virtue of its military and other power [footnote omitted] equally
clearly it has power in execution of the same functions to protect the relation once
formed from harms inflicted by others. [footnote omitted].

506 F. Supp. at 746 (quoting 332 U.S. 301, 305-06 (1947)).
91. Id. at 747.
92. Id.
93. Id.
94. Id.
raising questions about the conduct of military operations that a single plaintiff might not have standing to raise.\(^9\)

Turning to the second part of his analysis, Judge Pratt found that application of state law in the case would burden these substantial federal interests. If state law were applied, he stated, veterans who were injured together in Vietnam would be treated differently because their home states would apply different tort standards and different statutes of limitation.\(^9\) The court recognized that while unequal treatment of any plaintiff raises questions of justice to which federal courts are sensitive, it is the identity of the parties—veterans and war contractors—not merely their numbers, which makes equality of treatment a peculiarly federal concern in the Agent Orange litigation.\(^9\)

Finally, the district court determined that applying federal common law would not significantly displace state law.\(^9\) Although the Supreme Court had indicated in *Miree* a desire to minimize displacement of state law,\(^9\) especially in matters such as tort law which are usually governed by well-developed principles of state law, the court recognized that the claims in the Agent Orange litigation did not fall under a developed body of state tort law.\(^10\) State law has been applied to claims of veterans against war contractors, but only in the context of suits by individual soldiers alleging manufacturing defects in airplanes or explosives.\(^10\) In contrast, the Agent Orange litigation involves injuries allegedly caused by the use of defoliants and other toxic chemicals, an area in which federal regulation has largely preempted state regulation.\(^10\) The alleged injuries were incurred in combat areas overseas. The court concluded that because state law had never faced the question of war contractors' liability to soldiers injured by federally-regulated toxic chemicals while in combat abroad, it would not be displaced by application of federal common law.\(^10\)

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95. *Id.* at 747, 748 n.6.
96. *Id.* at 748.
97. *Id.* at 748 n.7. The court also found that applying disparate state laws would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. *Id.* at 748.
98. *Id.* at 749.
100. 506 F. Supp. at 748-49.
102. 506 F. Supp. at 749.
103. *Id.*
2. The Court of Appeals Opinion: Two Competing Federal Interests Do Not Equal One Federal Policy

The Court of Appeals for the Second Circuit reversed. The court approved the three-pronged analysis by the district court but disagreed with the lower court's finding on the first factor, the presence of a substantial federal interest. Because the Court of Appeals found no identifiable federal policy and therefore no reason to apply federal common law, it did not reach the district court's analysis of the other two elements.

The court identified two possible interests the federal government might have in litigation such as this: an interest in the adoption of a uniform rule per se and an interest in the content of the rule. It rejected the first possibility, concluding that the United States had no interest in a uniform rule because the suit involved only private parties and "no substantial rights or duties of the government hinge[d] on its outcome." The court agreed with the plaintiffs that the government had an interest in the content of any rule that might be adopted. It refused, however, to adopt a uniform rule because, the court stated, it could not determine the exact nature of the government's interest.

The court stated that in the past courts had adopted federal common law where the government had a single, identifiable interest such as preserving the federal fisc. In the Agent Orange litigation, however, the court found that the government had two competing interests. Any attempt by the court to fashion a rule favoring veterans or war contractors, wrote Judge Kearse, would necessarily disfavor the other group. The court refused to strike its own balance in the absence of a congres-

104. In re "Agent Orange" Prod. Liability Litigation, 635 F.2d 987 (2d Cir. 1980), cert. denied, 452 U.S. 958 (1981). The court affirmed the district court's decision that there is no private right of action under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-135k (1976). Id. at 991 n.9. This decision is in line with the Supreme Court's recent reluctance to allow private actions under federal statutes without explicit authorization from Congress. See supra note 80.

105. Id. at 993.

106. Id. at 993 n.11.

107. Id. at 993.

108. Id. The Court went on to say that results that vary from state to state are a consequence of the federal system and are not, in themselves, reason for judicial creation of an overriding federal law. The court cited Auto Workers v. Hoosier Corp., 383 U.S. 696 (1966), a case brought under § 301 of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185 (1976), to which federal common law applied but whose timeliness was nonetheless determined by the appropriate state statute of limitations. 635 F.2d at 994 (citing 383 U.S. at 701).

109. 635 F.2d at 994-95.

110. Id.

111. Id. at 994.
sionally identified federal policy.112

B. Analysis of the Second Circuit Opinion

1. The Federal Government's Interests in Veterans and War Contractors

The Second Circuit, in ruling that federal common law is not available to veterans claiming injuries from exposure to Agent Orange, distinguished Clearfield and Standard Oil because in those cases the government was a party asserting its own rights while in the case before it the litigants were private parties.113 The court stated that since the United States was not a party to the litigation its rights and duties were not directly involved; the court, however, went beyond that to state that "no substantial rights or duties of the government hinge on [the litigation's] outcome."114

By refusing to recognize the government's interest simply because the government was not a party to the litigation, the Second Circuit adopted a restrictive and unsupported view of the federal interest necessary for federal common law. In Clearfield and Standard Oil, the basis for the Supreme Court's decisions allowing the use of federal common law was the federal nature of the right involved, not the fact that the United States was a party. The Supreme Court emphasized that the critical issue in determining whether federal common law is to be applied is whether the dispute implicates the rights and duties of the United States.115 The party or non-party status of the government should not be determinative.

The Agent Orange controversy implicates the United States' interest in protecting soldiers from harm caused by defective war materials. The Supreme Court, in United States v. Standard Oil, recognized a federal interest in the relationship between the United States and members

112. Id. at 994-95. The court distinguished Owens v. Haas, 601 F.2d 1242 (2d Cir.), cert. denied, 444 U.S. 980 (1979), and Ivy Broadcasting Co. v. American Tel. & Tel., 391 F.2d 486 (2d Cir. 1968), where the courts were discerning a federal regulatory scheme from congressionally enacted statutes and supplementing it with federal common law. In the Agent Orange case, the Court refused to "devise such a scheme in the face of inaction by Congress." 635 F.2d at 995 (emphasis in original).
113. 635 F.2d at 993.
114. Id.
115. See, e.g., Miree v. DeKalb County, 433 U.S. 25 (1977); United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); Bank of America v. Parnell, 352 U.S. 29, 33-34 (1956); 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, 801 (1957). See also Georgia Power Co. v. 54.20 Acres, 563 F.2d 1178 (5th Cir. 1977), which analyzed the above cases and then applied federal law even though the suit was between private parties; Illinois v. City of Milwaukee, 406 U.S. 91, 105 (1972) ("[I]t is not only the character of the parties that requires us to apply federal law.").
of its armed forces and determined that events affecting the relationship should be governed by a uniform federal rule, even when Congress had not acted affirmatively. Only the federal government has the power to establish and maintain the military and to enact laws concerning its servicemen. Therefore, under Standard Oil, the government's interest in protecting its relationship with servicemen when third parties injure them should be governed by a federal, uniform standard. As the Supreme Court stated in Standard Oil, since "the federal government has the exclusive power to establish and define the relationship . . . equally clearly it has power in execution of the same functions to protect the relation once formed from harm inflicted by others." As the district court in In Re "Agent Orange" Product Lia-

116. 332 U.S. at 305-07.
117. The Constitution gives Congress the power to raise and support armies and a navy, and to make rules for their government and regulation. U.S. Const. art. 1, § 8, cl. 12-14. These powers have always been interpreted broadly. United States v. O'Brien, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping"); Seele v. United States, 133 F.2d 1015, 1023 (8th Cir. 1943) (Congressional power to declare war and raise and support armies embraces the authority to make all laws necessary and proper for executing such powers).
118. 332 U.S. at 306. The federal nature of the relationship between servicemen and the government has been emphasized in another line of cases which has had a direct impact on the Agent Orange case. Under the Federal Tort Claims Act (FTCA), the United States government waives its sovereign immunity from suits in tort, and vests jurisdiction over such claims exclusively in the United States District Courts. 28 U.S.C. § 1346 (1976 & Supp. IV 1980). If, however, a claim falls within any of the Act's exceptions, the court is without jurisdiction to hear the case. United States v. Orleans, 425 U.S. 807, 814 (1976); Dalehite v. United States, 346 U.S. 15, 30-31 (1953).

One exception to the waiver of immunity is for injuries to military personnel. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court denied recovery for injuries or fatalities sustained by military personnel on active duty as the result of negligence of others in the armed services. The Court held that "the government is not liable under the Federal Torts Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. The Court's primary reason for excluding servicemen was based on the "distinctively federal" nature of the relationship between the government and the armed forces. Id. at 143. The Court determined that Congress did not intend the government's liability to members of the armed services to depend upon the law of the place where the soldier happened to be stationed at the time of injury: "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." Id. The Court also noted that, without exception, the relationship of military personnel to the government has been exclusively governed by federal law. Id. at 146. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 670-71 (1977), reiterated the unique nature of the relationship between the government and the armed forces, and extended the reach of the "well-established doctrine of Feres v. United States" to third-party claims against the government.

The district court in the Agent Orange litigation held that because the veterans' claims of injury from exposure to Agent Orange arose during their military service, the claims against the government are barred by Feres. 506 F. Supp. at 776. The court dismissed the government as a party to the action. Id. at 782.

The Feres doctrine has been widely criticized. See, e.g., Stabile, Tort Remedies for Servicemen Injured by Military Equipment, 55 N.Y.U.L. Rev. 601 (1980); Note, From Feres
bility Litigation noted, torts committed by war contractors against soldiers interfere with the federal government's interest in its relationship with soldiers.\textsuperscript{119} The government's relationship with future servicemen is also affected by the Agent Orange Suit. The government's ability to attract citizens into the service and the success of a future draft may depend on the treatment of current veterans; thus, albeit indirectly, the national security may be affected by the litigation.

The Standard Oil Court recognized, in addition to the government's interest in protecting its servicemen, a federal financial interest when servicemen are injured by private parties.\textsuperscript{120} The Court analogized the government's interest in servicemen to the government's power to prevent or recover for any injury to federal property.\textsuperscript{121} The federal government certainly has a financial interest in the fate of the Agent Orange veterans. Congress directed the Veterans Administration to conduct an epidemiological study of soldiers exposed to Agent Orange to determine if they suffered long-term adverse health effects as a result.\textsuperscript{122} The continuing interest of the federal government in the health, safety and welfare of all its servicemen and veterans is reflected in a large number of congressional enactments.\textsuperscript{123} Injured veterans may be eligible for supplemental security income,\textsuperscript{124} health insurance\textsuperscript{125} and disability insurance benefits,\textsuperscript{126} or analogous state programs that depend on substantial federal funding.\textsuperscript{127} The United States has an expressed interest in protecting the employment security of draftees.\textsuperscript{128}

\textsuperscript{119} 506 F. Supp. at 746.
\textsuperscript{120} 332 U.S. at 310-11.\textsuperscript{121} \textsuperscript{Id} at 306 n.19. See U.S. CONST. art. IV, § 3, cl. 2 (Congress has power to regulate or dispose of property belonging to the United States); United States v. Walter, 263 U.S. 15, 17 (1922).
\textsuperscript{125} \textit{Id.} §§ 1395-1395tt.
\textsuperscript{126} \textit{Id.} § 423.
\textsuperscript{127} The federal government makes substantial grants of money to state unemployment compensation and child health and welfare programs. 42 U.S.C. §§ 501-504, 601-660, 701-716 (1976 & Supp. IV 1980). See also \textit{id.} §§ 1351-1355, 1396-1397f (grants to states for aid to the permanently disabled and for medical assistance programs).
\textsuperscript{128} 38 U.S.C. §§ 2021-2026 (1976 & Supp. III 1979). See also Note, \textit{Veterans Reem-
which is frustrated when veterans injured by exposure to toxic chemicals returned from Vietnam unable to work.

Aside from the government’s proprietary and monetary interest in veterans, the government has an interest in its relationship with war contractors, which, according to the Supreme Court, “is certainly no less ‘distinctively federal in character’ than the relationship between the Government and its soldiers.” Federal legislation pervades the area of government contracting and war materials procurement.

The Agent Orange litigation “will have a direct and lasting impact on the relationship between the federal government and war contractors,” said the court of appeals. Suits brought by servicemen against manufacturers have a significant effect on the cost of military equipment which in turn implicates a broad federal monetary interest. If the 2.4 million potential plaintiffs were to prevail in the Agent Orange litigation, chemical manufacturers would incur enormous liability. Under current law the manufacturers could not seek indemnification from the government when the underlying injury occurs incident to service. They would likely pass on the burden of liability to the government in the form of significantly higher prices, demand contractual indemnification, or refuse to contract with the government at all.

2. The Federal Interest in Uniform Rules

The preceding discussion outlined the federal government’s substantial interest in the Agent Orange litigation. But does this interest justify the creation of federal common law? The Second Circuit opinion identified two federal concerns that are inherent when the government seeks to enforce its rights. According to the court, the government has an interest first, in having uniform rules govern its rights and obligations and second, in the contents of those rules. In Standard Oil, the Court recognized the government’s interest in uniformity but refused to impose liability on a private party who had injured a soldier as the substance of that law. The Second Circuit held that in litigation between private parties there is no federal interest in


131. 635 F.2d at 994.
132. Depending on the state law being applied, the manufacturers might be liable for the government’s conduct as well as their own. See Comment, Stencel Aero Engineering Corporation v. United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers, 29 Hastings L.J. 1217, 1233-35 (1978).
134. 635 F.2d at 993.
135. 332 U.S. at 306.
uniformity for its own sake. The fact that state law may produce varying results does not justify creating an overriding federal rule; even if federal common law were applied, the court stated, uniformity would not be assured since federal common law frequently takes its substance from state law.

The logic underlying the Second Circuit's conclusion that applying federal law would not assure uniformity is circuitous. If a court determined that federal interests were sufficient to justify the application of federal common law, it would then decide whether those interests would be best accommodated by adopting state law as the federal rule of decision or by fashioning a new rule. For example, in *Clearfield*, the Supreme Court found that the government had an interest in having a federal law govern disputes over its rights and duties concerning commercial paper. The Court further held that if state law were selected as the federal rule the rights and duties of the United States would be subject to "exceptional uncertainty." To protect the federal government from the application of nonuniform rules to identical transactions, the Court held that a uniform federal rule was necessary.

The Second Circuit Court relied on *Auto Workers v. Hoosier Corp.* to show that a federal interest does not always justify a uniform rule. In *Hoosier*, the Supreme court held that while federal common law applied to a suit under the Labor Management Relations (Taft-Hartley) Act, state statutes of limitation governed the filing of that suit. The Court reasoned that a uniform rule was necessary to govern the execution of a collective bargaining agreement because nonuniform rules would disrupt the negotiation and administration of

136. 635 F.2d at 993.
137. *Id.* at 994.
139. *Id.* at 367. Similarly, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court considered whether the federal rule of survivorship should take its content from state law and concluded that only a uniform rule would redress the deprivation suffered by the respondent. *Id.* at 23.
142. 383 U.S. at 706-07.
such agreements. But since 1830 state statutes of limitation had been applied to federal causes of action absent congressional direction to the contrary. The Hoosier Court concluded that nonuniform statutes of limitation would not interfere with the chief purpose of federal labor law—the formation of collective bargaining agreements—because they come into play only after the agreements have broken down.

Thus, when a uniform rule is desired, and the use of state law would undermine the federal interest, state law should be rejected as a choice of law. In the Agent Orange case, the federal interest in having uniform rules govern servicemen and war contractors should prohibit the adoption of varying state law as the federal rule.

3. The Government’s Substantive Interest in a Federal Rule

The Second Circuit opinion identified two conflicting federal interests in the Agent Orange litigation: the welfare of servicemen and veterans, and the government’s financial relationship with war contractors. The court distinguished the Agent Orange cases from “Clearfield-type” cases, in which the government was only interested in preserving the federal fisc. Neither Clearfield itself nor the line of cases following it, however, held that federal common law may only be applied if necessary to preserve the fisc. The Clearfield Court applied federal common law because “[t]he application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty . . . . Identical transactions [would be] subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.” The Court was obviously concerned about how varying state laws would affect government interests, not merely about enforcing the government’s monetary interests.

The cases denying application of federal common law make the same point. In Miree v. DeKalb County, state law was applied because there was no “identifiable federal interest” at all in the outcome of the litigation, not solely because no federal interest in preserving the fisc was implicated.

143. Id. at 702-03 (quoting Local 174, Int’l Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1961)).
144. Id. at 703-04.
145. Id. at 702.
146. See Stabile, Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Law, 55 N.Y.U.L. REV. 601, 618 n.102 (1980), distinguishing cases where state law was applied as the federal common law.
147. 635 F.2d at 994.
148. Id.
149. 318 U.S. at 367.
150. 433 U.S. at 28. The United States had waived its right to respond in the case because its operations were not burdened or subject to uncertainty by variant state law interpretation. Id. at 29-30.
In the Agent Orange litigation, the Second Circuit Court recognized the federal interests at stake, agreed the litigation would have a lasting effect on the relationship between the government and the contractors, and acknowledged the government’s concern with the welfare of its veterans. But the court held that federal common law may be applied only when an “identifiable federal policy” is threatened by the use of state law. Because the government’s interests in veterans and contractors conflicted, the court refused to apply a uniform federal rule. It left to Congress a resolution of the federal policy conflict.

The court’s emphasis on federal policy was misplaced. The authorities on which the court relied, Miree and Wallis v. Pan American Petroleum Corp., require only that there be “a significant conflict between some federal policy or interest and the use of state law” before federal law is appropriate. Nowhere do they suggest the Second Circuit’s theory that an “identifiable federal policy” is essential. Further, even in cases where only one federal interest is involved, courts cannot avoid formulating policy in determining the substance of a federal rule. A court must decide whether to choose state law as the federal rule of decision or to construct a rule by interpreting general principles of law.

The question before the court was whether federal common law should apply, not how the case should be decided. The purpose of applying federal common law is to insure uniform treatment to controversies that implicate governmental interests. While each interest is furthered only if the rule selected favors it, it does not follow that the federal government is uninterested in having uniform rules govern cases that concern its interests. By leaving for Congress a policy decision balancing the federal interests in veterans and contractors, the Second Circuit thwarted the government’s interest in uniform decisions. The court refused to develop and apply rules of law that take into account competing federal interests because Congress had not articulated any federal policy concerning veterans injured by war contractors. Because Congress had not acted, the court did not act and left the courts of the fifty states to balance the interests of the United States.

C. Effects of the Application of State Law

Currently, suits brought by servicemen against manufacturers are

151. 635 F.2d at 994.
152. Id.
153. Id. at 994-95.
155. See Clearfield, 318 U.S. at 367.
decided under state law, including state choice of law rules, when the claims involve injuries sustained abroad. Courts generally apply the same substantive law to manufacturers of military equipment as to other defendant manufacturers in product liability actions, but the substantive law of product liability varies widely among states. For example, states have adopted varying standards of care. A manufacturer's responsibility to meet the prevailing state of the art in design and manufacture is sometimes decided on negligence theories and sometimes on a strict products liability theory. Indiana, which uses a negligence standard, makes it a complete defense if the design and manufacture of a product were "in conformity with the generally recognized state of the art at the time the product was designed and manufactured." Several state statutes provide a defense if the alternative design suggested by the plaintiff was not technologically feasible for the industry. Under these statutes, a defendant cannot be found negligent for failing to advance the state of the technology. But in strict products liability states, such as Oregon, the focus is not on the reasonableness of the manufacturer's actions, but on the dangerousness of the design. Scienter, so important in negligence cases, is not a factor in deciding cases brought under a strict products theory: whether the de-


160. IND. CODE ANN. § 34-4-20A-4(b)(4) (Burns 1978). This statute would appear to make industry custom an absolute defense and is a departure from the well established common law rule that although custom may be relevant to the issue of negligence or defect is not dispositive. See, e.g., The T.J. Hooper, 60 F.2d 737, 740 (2nd Cir. 1932) (where Judge Learned Hand wrote that while the general practice of an industry may be the standard of proper diligence, in some cases "a whole calling may have unduly lagged in the adoption of new and available devices").


fendant knew or should have known about either the risk or the technology to reduce the risk is irrelevant. 163

The availability of defenses such as contributory or comparative negligence and assumption of the risk also varies. 164 Inevitably, statutes of limitation vary. Generally, they begin to run on the day the action that causes the injury is committed, but in cases of diseases that entail a long latency period between cause and effect—such as many cancers—courts are often willing to hold that the statutory period begins when the disease is discovered. 165 Most states’ statutes of limita-

includes a good discussion of the difficulties authorities in the field have had in sorting out the question of how negligence and strict products liability differ. 269 Or. at 459-60.

163. Id. at 460-61. Not only does products liability differ from negligence, it itself varies from state to state.

There is a vast difference of opinion, for example, among states as to the proper definition of “defect.” The establishment of a defect is crucial to the development of a prima facie case in products liability. Three well-established categories of defects are generally recognized as bases for liability: design defects, production defects, and failure to warn. Schwartz, Foreword: Understanding Products Liability, 67 CALIF. L. REV. 435 (1979). Each type is potentially involved in the Agent Orange litigation, but states do not agree what constitutes a defect in each category. Several jurisdictions have defined design defects so as to permit the plaintiff to make out a prima facie case by establishing either (1) that the product failed to perform as an ordinary consumer would expect it to perform when used in an intended or reasonably foreseeable manner, even if there were no alternative method of reducing the risk by redesigning the product (the “consumer expectation test”); or (2) that the risks inherent in that design are not justified by its intrinsic benefits, whether measured in terms of cost saving, improved performance, or other factors, (the “risk/utility test”). See, e.g., Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979). See also Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S. CAR. L. REV. 803, 843-45 (1976); Twerski, From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297, 305-16 (1977). Cf. Schwartz, supra.

Another controverted issue is whether liability should automatically attach when a manufacturer fails to meet its own internal design specifications. See Draft Uniform Product Liability Law, § 104(c), reprinted in 44 Fed. Reg. 2996 (1979); Twerski & Weinstein, A Critique of the Uniform Product Liability Law—A Rush to Judgment, 28 DRAKE L. REV. 221, 225 (1979).

States also disagree about what a manufacturer should warn product users against and how to establish causation in “failure to warn” cases. Some authorities favor a presumption that a warning would have been heeded if given, and some take the position that no causation requirement in the “but for” sense should be imposed in a failure to warn case. See Draft Uniform Product Law § 104(c)(3), supra; Twerski & Weinstein, supra, at 236-37; Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1274 (5th Cir. 1973), cert. denied, 419 U.S. 1096 (1974); Cunningham v. Charles Pfizer Co., 532 P.2d 1377, 1381 (Okla. 1974).


165. Compare Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978) (where the plaintiff was exposed to asbestos products more than 20 years prior to the initial clinical manifestations of injury, which was subsequently diagnosed as cancer, the court held that in cases where the initial injury is inherently unknowable, the period of limitation does
tion periods for tortious injury run within two or three years.\textsuperscript{166}

When tort litigation involves more than one jurisdiction, the substantive law applied depends on the forum state's choice of law rules. At least eleven states employ the traditional rule of \textit{lex loci delicti}, which routinely applies the law of the place of injury.\textsuperscript{167} Most other states apply the law of the state that has the "most significant relationship" to the parties or the underlying event; the situs of the injury is one of several factors that may be considered.\textsuperscript{168} In disputes involving large numbers of parties, such as the Agent Orange litigation, with a potential of 2.4 million plaintiffs from all fifty states, and chemicals manufactured in five states, this is no mean feat.\textsuperscript{169}

Reliance on state law to decide the Agent Orange suits will lead to inconsistent rules of liability, varying according to each state's conflicts and tort law. This inconsistency may frustrate federal interests by subjecting servicemen who fought together and incurred identical injuries to varying possibilities of recovery, and military equipment suppliers to undue uncertainty. The enormity of the military equipment manufact-

not begin to run until the plaintiff ascertains or reasonably should have ascertained the nature and cause of the injury) \textit{with} Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 391 N.E.2d 1002 (1979) (where the statutory period in a products liability action was deemed to begin to run upon injection of a drug although the deleterious effects of the drug were not discovered for almost 20 years).


In 1978, Professor Robert Sedler offered the following summary: "Among the 50 states and the District of Columbia, the breakdown is as follows: abandoned the place of the wrong rule—27; adhered to the place of the wrong rule—18; have not yet passed on the question—6." Sedler, \textit{Choice of Law in Michigan: A Time To Go Modern}, 24 \textit{Wayne L. Rev.} 829, 831 n.12 (1978).


\textsuperscript{169} Two recent mass tort cases illustrate judicial solutions to what would otherwise be the insuperable problem of assessing plaintiff contacts. In one, the task of examining state interests and plaintiff contacts was abandoned entirely. \textit{See} In re Aircraft Disaster Near Saigon, 476 F. Supp. 521, 526-29 (D.D.C. 1979) (crash of military transport—law of District of Columbia as federal seat held applicable). In the other, the court used a "governmental interest" approach), \textit{see} Sedler, \textit{supra} note 196, and concluded that the interest of the state where the act ultimately underlying the litigation took place justifies the application of that state's law. \textit{In re Paris Air Crash of March 3, 1974}, 399 F. Supp. 732, 741-44 (C.D. Cal. 1975) (law of manufacturer's state of incorporation held applicable).
turers' liability and the uncertainty of varying liability rules may cause manufacturers to alter their relations with the government. Wary manufacturers may be deterred from entering into military contracts at all for fear of uninsured liability. Some might insure themselves for the greatest expected liability under any state's tort law and pass on the extra cost to the government. These manufacturers would be at a competitive disadvantage to others less conservative in their risk assessments. Manufacturers who under-insure would defeat both the interests of the federal government in seeing injured servicemen compensated and of states with strict product liability policies where manufacturers would be unable to pay large damage awards. Under a uniform rule risks could be estimated more accurately.

Further, state courts applying state law to suits against Agent Orange manufacturers are unlikely to formulate standards of liability by balancing the federal government's conflicting interests. A state may be primarily concerned with its military equipment industry and lack an interest in the welfare of servicemen. Or, the state may be concerned with protecting its residents and ignore the government's interest in keeping manufacturers willing to supply war materials. Even if some state courts attempted to balance the federal government's interests, it appears improbable that all courts would so attempt and impossible that they would all strike the same balance.

The Agent Orange problem is national in scope, and involves significant federal interests. Traditional state choice of law rules appear unable to resolve, on the basis of state policy analysis, which state law should apply. No state interests would suffer from the application of federal common law. Individual states have an interest in the welfare of those of their citizens who served in Vietnam, but the federal government has at least an equal interest in the welfare of those same veterans. Moreover, in the case of the Agent Orange victims, the tort occurred in Southeast Asia, where state interest in the welfare of United States soldiers and regulation of federal war contractors can only be called remote. The application of a uniform federal common law rule, which would assure that all veterans received the same measure of justice, would not unduly jeopardize any state interest.

D. The Statutory Scheme to Protect Veterans

The majority in the Second Circuit Court's opinion distinguished the Agent Orange suits from cases in which courts were asked to supplement an existing statutory program with federal common law, finding that Congress had not specifically acted to protect veterans. As Chief Judge Feinberg ably pointed out in his dissent, however, the vet-

170. 635 F.2d at 995.
erans' cases are difficult to distinguish from *Owens v. Haas,* a 1979 Second Circuit case. The plaintiff in *Owens* was a federal prisoner injured by county jail officials who were working under contract with the federal government. He sued corrections officers and the county for damages as, *inter alia,* a third-party beneficiary of the contract. At issue was whether his claims were a matter of federal law or state law. The Second Circuit found a “federal regulatory scheme” concerning federal prisoners that indicated Congressional intent “to provide some general protections for federal prisoners.” The court concluded that the regulatory scheme evinced a federal interest in assuring uniform treatment of federal prisoners and that federal common law should therefore apply.

Similarly, the Agent Orange litigation implicates a federal statutory scheme to provide “general protection” for members and veterans of the uniformed services. The federal government is under a statutory obligation to provide “an improved and uniform program of medical care for members [of the uniformed services] and certain former members of those services, and for their dependents.” In his dissent, Chief Judge Feinberg wrote:

> 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. The majority suggests that the anomaly here lies ‘with Congress, which has made specific provisions for the protection of the government’s prisoners but not for its soldiers.’ But a review of the statutory and regulatory provisions cited above . . . , as well as myriad, detailed Army Regulations, demonstrates beyond doubt that Congress has made specific provisions for the protection of its soldiers, both directly and by delegation.

*Owens* and the Agent Orange suits may be contrasted with *Miree v. DeKalb County,* on which the Second Circuit relied. In *Miree,* the

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172. 601 F.2d at 1249.
173. *Id.*
174. 635 F.2d at 997. *See also* 10 U.S.C. §§ 1071-87 (1976 & Supp. IV 1980) (program of medical care for members of uniformed services and dependents); 38 U.S.C. §§ 310-15 (1976 & Supp. IV 1980) (schedule of compensation to veterans and dependents for wartime disabilities); *id.* §§ 321-22 (schedule of compensation to survivors of veterans for wartime death); *id.* §§ 331-35 (same, peacetime disabilities); *id.* §§ 341-42 (same, peacetime death); 50 U.S.C. app. § 454(a) (1976) (requiring adequate provision of shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations before persons can be inducted into military service). Various regulations governing the welfare of soldiers are also promulgated under authority granted by Congress. 10 U.S.C. § 121 (1976) (President's power to prescribe regulations); *id.* § 3012(g) (Secretary of Army's power to prescribe regulations).
175. 635 F.2d at 998 (Feinberg, C.J., dissenting).
plaintiffs, the survivors of passengers killed in an air crash, sought to assert federal common law as third party beneficiaries of a contract with the government, but the government had no interest in the plaintiffs' welfare comparable to its interest in federal prisoners or servicemen. The *Miree* Court noted that the government's contractual relations would be only slightly and indirectly affected by the plaintiffs' suit, and concluded that Congressional regulation of the field of air travel was not extensive.176

Since Congress has not formulated standards of liability, judicial development of federal common law standards would have been proper in the Agent Orange litigation. As the *Standard Oil* Court noted, if federal common law is "necessary or appropriate," courts may apply it if "Congress has not acted affirmatively about the specific question."177 Then, when Congress chooses, it may supplant the common law formulated by federal courts.178

**CONCLUSION**

In *In re "Agent Orange"* the Second Circuit refused to apply federal law to a case of enormous national scope. The plaintiffs, who numbered hundreds and came from all over the country, were veterans—a group of uniquely federal concern. The defendants included major suppliers of the United States military. The federal government's long-recognized interests in both these groups is undisputed.

Authority for the application of federal law in the Agent Orange litigation comes both from the Constitution and from the power of federal courts to fashion interstitial common law. The Constitution gives Congress the power to establish and maintain a military, and as the Supreme Court has recognized, necessary and proper to the exercise of that power is the ability to protect servicemen.179 The constitutional source of authority and the importance to the United States of a uniform decisional rule to govern controversies implicating its interests justify the application of federal common law to the Agent Orange litigation. By leaving the cases to be decided under varying state law, the Second Circuit has ignored the reason for the existence of federal common law.

Alternatively, authority for applying federal common law can be found in the court's power to fashion interstitial common law.

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176. 433 U.S. at 32.
gress has constructed an elaborate network of statutes dealing with members of the armed forces and with military contractors. Although the court may reasonably conclude that Congress intends to limit statutory causes of action to those it explicitly allowed, the court should not assume that Congress meant to deny federal courts their historic power to fashion interstitial law whenever that power is not expressly granted. This judicial abdication in the face of congressional silence undermines the federal courts' traditional role as interpreter of federal statutes.¹⁸⁰

Perhaps the Second Circuit's decision was intended to prompt Congress to take affirmative action with regard to Agent Orange victims.¹⁸¹ Federal legislation could resolve the problems of both plaintiffs and defendants who attempt to litigate the same issue under fifty different sets of laws, in addition to the relief it would provide crowded federal courts.

Fortunately, the Second Circuit's opinion is not binding on other circuits, and it is unlikely they will adopt the Second Circuit's rationale for denying the availability of federal common law when the United States is not a party. Precedent does not support the ruling. Other circuits should more carefully review the rationale behind the doctrine of federal common law. If a similar case should be litigated, however, the availability of federal common law to the plaintiffs appears limited unless the Supreme Court reaffirms the viability of federal common law or Congress intervenes.


¹⁸¹. Sen. Alan Cranston of California proposed an amendment to the legislation authorizing the Veterans Administration study of Agent Orange victims, see supra note 121 and accompanying text, that would have provided limited medical care for veterans exposed to Agent Orange or radiation, but the amendment failed in committee. 127 CONG. REC. S6183 (Daily Ed. June 15, 1981).