NOTE

Agent Orange and National Consensus Law: Trespass on *Erie* or Free Ride for Federal Common Law?

In 1946, eight years after the Supreme Court's Erie *decision, Judge (later Justice) Charles E. Clark lauded the emergence of a new federal common law capable of resolving nationwide legal problems. He described a "great need of unity among mankind" and "a sense of the nearness of all parts of the world to all other parts." Judge Clark saw federal common law as a way of achieving national unity. He noted that "our forefathers planned 'a more perfect union,' not a proving ground for the conflicts of laws, and . . . that union after many a travail has achieved a power and a unity, and in consequence a purpose and force, unequalled in history. . . . [W]e should ask ourselves whether its jurisprudence should lag behind."* [1] *Federal common law, however, has not proved the panacea that some envisioned for complex federal litigation. This Note examines one judge's alternative solution to the complexities of modern federal litigation: In* Agent Orange, *Chief Judge Jack Weinstein of the Eastern District of New York hypothesized a "national consensus law" as a means of resolving multistate litigation that implicates national interests. Although closely related to federal common law, this national consensus law derives from the* Erie *doctrine itself and holds significant potential for future litigation.*

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[1] Clark, *State Law in Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 296 (1946).

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INTRODUCTION

In the years since the Vietnam War, global transactions have become more common.[2] The activities and influences of United States cultural, educational, legal, military, and business institutions are geographically widespread. As major transactions reach beyond single states and nations,[3] society is becoming more homogeneous.[4]

Federal courts are particularly appropriate forums for resolving legal disputes that arise from multistate and multinational transactions.[5] Yet the more states a transaction touches, the more difficult it is for federal courts to manage resulting litigation efficiently.[6] Even consolidating related cases from different states[7] cannot eliminate difficulties created by multistate contacts and the federal court choice-of-law doctrines.[8] Paradoxically, then, federal courts are poorly equipped to resolve complex multistate disputes.

The Vietnam-related *Agent Orange* litigation[9] proved an apt vehicle

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[2] In the years from 1973-83, for instance, the volume and value of United States imports and exports roughly tripled. *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, at 813 (105th ed.). The Supreme Court recognized this trend in the early to mid 1970's. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 (1974); *id.* at 533 (Douglas, J., dissenting) and sources there cited; The Bremen v. Zapata Off-shore Co., 407 U.S. 1, 8-9 (1972). *See also* von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 29 (Spring 1977) ("contemporary economic and social life spills across the boundaries of nation states . . . ."); Nadelmann, *Clouds Over International Efforts to Unify Rules of Conflict of Laws*, 41 LAW & CONTEMP. PROBS. 54, 83-84 (Spring 1977) (discussing the need for an American journal on international conflicts law due to growing international business).

[3] *See* Tooker v. Lopez, 24 N.Y.2d 569, 593, 249 N.E.2d 394, 409, 301 N.Y.S. 2d 519, 540 (1969) (Breitel, J. dissenting) ("In this highly mobile . . . Nation . . . multistate contacts [are] very frequent, and [are] becoming increasingly so."); W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 1, 6 (8th ed. 1984). *See also* UNITED STATES BUREAU OF THE CENSUS, *supra* note 2, at 615 (the number of United States domestic revenue passenger miles flown grew from 104.1-226.5 billion between 1970-83; international passenger miles originating or ending in the United States grew from 27.6-54.8 billion).

[4] *See, e.g.*, *infra* notes 209-17 and accompanying text.

[5] *See, e.g.*, 28 U.S.C. § 1332 (1982) (statute conferring federal jurisdiction in suits between parties of diverse citizenship).

[6] *See infra* text accompanying notes 20-29.

[7] For discussion of some of the ways in which federal courts can consolidate cases, see *infra* note 57.

[8] *See infra* parts I B & II A-B.

[9] *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984). *See infra* note 12.

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to remedy this paradox. The Vietnam era's advances in communications technology brought society closer together.[10] Along with bitter political controversy, the War's technological breakthroughs altered the United States perception of itself permanently.[11] Now, more than a decade after Vietnam, citizens from many states are seeking legal redress for injuries they suffered during the War. The presiding judge in the largest of these cases, *Agent Orange*, suggested that the modern legal trend toward national homogeneity could solve the federal courts' choice-of-law quandary in complex multistate cases.

The spectacular *Agent Orange Product Liability Litigation*[12] itself

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[10] For instance, the Vietnam War brought major breakthroughs in electronic news broadcast and military intelligence technology. *See* M. ARLEN, LIVING-ROOM WAR (1969); *Communications: New Technology for Civil Uses Evolving*, AVIATION WEEKLY, Aug. 23, 1971, at 79-83; Elson, *Passive Vision Aids Pierce Vietnam Night*, AVIATION WEEKLY, June 3, 1968, at 89-91; *Living-Room War: Impact of TV*, U.S. NEWS, Mar. 4, 1968, at 28-29; *see also* Shearer, *Automated War*, NEW REPUBLIC, May 30, 1970, at 14-15 (discussing the use of lasers and computers); *Spotting the Infiltrators*, NEWSWEEK, May 27, 1968, at 30 (discussing the use of electronic devices).

[11] *See* P. STARR, THE DISCARDED ARMY: VETERANS AFTER VIETNAM (1973) (Nader report); Hanes, *Agent Orange Liability of Federal Contractors*, 13 U. TOL. L. REV. 1271 (1982).

[12] *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984). There are over 40 published *Agent Orange* opinions. This Note cites *Agent Orange* opinions only when relevant to issues discussed herein. The italicized phrase "*Agent Orange*" refers to the consolidated case, *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), and related litigation. A comprehensive list of *Agent Orange* opinions through September, 1984 is set forth in *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 876 (E.D.N.Y. 1984). This Note uses the nonitalicized phrase "Agent Orange" to refer to the group of chemical defoliants to which the veterans claimed exposure. *See infra* note 14.

For commentary generated by early stages of the litigation, see Epstein, *Problems of Causality, Burden of Proof & Restitution*, TRIAL, Nov. 1983, at 91; Feldman, *Agent Orange Disease: Media Hype or Life Threatening Reality?*, 11 LEGAL ASP. MED. PRAC. 5 (1983); Hanes, *supra* note 11; Houts, *Update on Agent Orange*, 24 TRAUMA 101 (1982); Lacey, *Agent Orange: Government Responsibility for the Military Use of Phenoxy Herbicides*, 3 J. LEGAL MED. 137 (1982); Norris, Fudala & Watson, *Agent Orange*, 7 AM. J. L. & MED. 46 (1981); Snyder, Stichman & Addlestone, *Agent Orange in the Courts*, 16 CLEARINGHOUSE REV. 415 (1982); Wilber, *Agent Orange & Dioxin: Do 2.4 Million Plaintiffs Have a Cause of Action?*, 22 TRAUMA 11 (1980); Yannacone, Kavenagh & Searcy, Agent Orange *Litigation: Cooperation for Victory*, TRIAL, Feb. 1982, at 44 (1982) (written by plaintiffs' then lead counsel); Comment, *Expansion of the* Feres *Doctrine*, 32 EMORY L.J. 237 (1983); Comment, *Agent Orange as a Problem of Law and Policy*, 77 NW. U.L. REV. 48 (1982) [hereafter Comment, *Agent Orange as a Problem of Law and Policy*]; Note, *Agent Orange Revisited: Alternatives to Litigation*, 6 AM. J. TRIAL ADVOC. 323 (1982); Note, In re "Agent Orange" Product Liability Litigation: *Limiting Use of Federal Common Law as the*

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exemplified the complex legal consequences of transfrontier events. Between 1978 and 1980, 3,400 plaintiffs, largely United States veterans, sued nineteen major chemical manufacturers.[13] Plaintiffs claimed injuries from exposure to defoliants used by the United States in Southeast Asia.[14] The alleged wrongs occurred over a period beginning more than

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Basis for Federal Question Jurisdiction in Private Litigation, 48 BROOKLYN L. REV. 1027 (1982); Note, *Class Actions and Mass Toxic Torts*, 8 COLUM. J. ENVTL. L. 269 (1982); Note, *The Agent Orange Litigation: Should Federal Common Law Have Been Applied?*, 10 ECOLOGY L.Q. 611 (1983) [hereafter Note, *The Agent Orange Litigation*]. The press touted *Agent Orange*'s settlement as the "largest ever . . . for wrongful injury." N.Y. Times, May 8, 1984, § 1, at 1, col. 5.

[13] *Agent Orange*, 506 F. Supp. at 783 (case management plan in initial class action certification under FED. R. CIV. P. 23(b)(3)); *Agent Orange*, 580 F. Supp. at 692. Claims were so numerous that judges instructed claimants to suspend filing of further actions. *Agent Orange*, 506 F. Supp. at 783.

[14] Plaintiffs based their claims on theories of negligence (in the manufacture and sale to the government of dioxin-contaminated phenoxy herbicides including Agent Orange), strict liability, breach of warranty, intentional tort, and nuisance. *Agent Orange*, 506 F. Supp. at 769. Plaintiffs claimed that their exposure to the defoliants and the failure of defendants and the government to warn them of dangers caused skin-related injuries, such as chloracne; systemic injuries, such as soft tissue sarcoma and porphyria cutanea tarda (a metabolic liver disease); and genetically related injuries, such as miscarriages to veterans' wives and children born with dioxin-induced birth defects. *Agent Orange*, 597 F. Supp. at 750.

Agent Orange was a 50/50 mixture of phenoxy herbicides 2,4,5-T and 2,4-D. *Id.* at 776. Many of the plaintiff veterans also handled and applied several other herbicide formulations. All formulations contained large percentages of phenoxy herbicides 2,4-D or 2,4,5-T. *See id.* at 775-76.

The herbicides comprising Agent Orange are not highly toxic in the acute sense. *See, e.g.*, NATIONAL INST. OF OCCUPATIONAL SAFETY & HEALTH, AGRICULTURAL CHEMICALS AND PESTICIDES: A SUBFILE OF THE REGISTRY OF TOXIC EFFECTS OF CHEMICAL SUBSTANCES 3, 6 (1977). However, 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD), a substance with extreme risk of adverse health effects, is a trace contaminant of 2,4,5-T. *See Agent Orange*, 597 F. Supp. at 775-95 (factual problems with claims, including scientific studies on causality). The scientific community broadly regards TCDD as one of the most potent toxic substances manufactured. *Id.* A substantial body of literature documents a wide range of dioxin's chronic effects, including cancer and genetic changes that may result from even trace exposures. *Id.* The chemical industry uniformly agrees that some level of TCDD contamination is unavoidable in 2,4,5-T production. *See generally id.* at 776-99 and sources cited therein. *See also* SOUTH OKANAGAN ENVIRONMENTAL COALITION, THE OTHER FACE OF 2,4-D; A CITIZEN'S REPORT (1976) and sources cited therein.

Dioxin was a contaminant in virtually all of the herbicides to which the Vietnam veterans claimed exposure. *See* Coalition for Responsible Pest Management, The History and Future of Phenoxy Herbicide 2,4-D: A Request for Action in Santa Cruz County (Oct. 25, 1979) (unpublished report). Up to 60 different dioxins exist. *Id.* at 28-30. In addition to containing many of these other dioxins whose effects have not

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twenty years ago,[15] in nineteen foreign and domestic jurisdictions.[16] Plaintiff class representatives estimated more than 2.4 million potential class members worldwide.[17] Nearly 600 suits that 15,000 named plaintiffs initiated in state and federal courts nationwide and abroad were ultimately consolidated before the federal court for the Eastern District of New York.[18] By 1985, an additional 230,000 plaintiffs had filed settlement claims.[19]

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been closely studied, some batches of 2,4-D have also contained the highly toxic TCDD. *Id.* TCDD's dangerous nature caused the United States Department of Food and Agriculture (USDA) to suspend registration of 2,4,5-T for some uses and cancel registration for other uses altogether in 1970. *See* Dow Chemical Co. v. Ruckelshaus, 477 F.2d 1317, 1318-19 (8th Cir. 1973) (litigation against Environmental Protection Agency (EPA) over USDA's order and subsequent agency action). The EPA issued a final ban on all 2,4,5-T uses in 1985. Wall St. J., Mar. 19, 1985, § 1, at 29, col. 4 (Eastern ed.). Uncertainty about different herbicide forumlations, supplies coming from different manufacturers, and varying routes and durations of exposure were among the practical difficulties that plagued *Agent Orange* plaintiffs in court. *See Agent Orange*, 597 F. Supp. at 787-99.

[15] The United States used Agent Orange in Southeast Asia beginning in 1965. *Agent Orange*, 597 F. Supp. at 776. By the time the government discontinued using Agent Orange in 1971, the United States had applied 11.22 million gallons of Agent Orange and 6.36 million gallons of other phenoxy herbicides throughout the Vietnam War region. *Id.* at 780. Agent Orange selectively kills broad leaf vegetation at low rates of application; the United States military used the defoliants in efforts to eradicate possible cover and cropping areas for enemy guerrillas. *Id.* at 775. For a comprehensive selection of technical sources generated mostly by the government on health effects of Agent Orange, see Comment, *Agent Orange as a Problem of Law and Policy*, *supra* note 12, at 49-55.

[16] *Agent Orange*, 580 F. Supp. at 700-01. Foreign jurisdictions included Vietnam, Germany, Canada, Laos, and Cambodia. *Id.* at 700.

[17] *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 757, 760 (E.D.N.Y. 1980). This estimate did not include veterans' family members, who also might have had direct and derivative rights of action. *Id.* A court-appointed special master estimated potential class members in excess of 40,000. *In re* Diamond Shamrock Chem. Co., 725 F.2d 858, 862 (2d Cir. 1984).

[18] Plaintiffs filed actions in virtually every state, the District of Columbia, Puerto Rico, and Australia. *Agent Orange*, 580 F. Supp. at 692. In 1980 the federal Judicial Panel on Multidistrict Litigation consolidated 167 actions for pretrial in M.D.L. No. 381 before the federal court for the Eastern District of New York, pursuant to 28 U.S.C. § 1407 (1982). *See Agent Orange*, 506 F. Supp. at 783. The 167 actions ultimately grew to over 600. *Agent Orange*, 597 F. Supp. at 751. The initial transfer was for pretrial purposes only. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983). However, shortly after the transfer of the first eight cases, District Judge Pratt tentatively certified a diversity class action to adjudicate the government contract defense issue. *Id.* For a description of the government contract defense, see *infra* note 196.

[19] *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396, 1401 (E.D.N.Y.

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Determining which jurisdiction's law controls a lawsuit can be difficult enough in single car accidents.[20] It is exasperating in complex and geographically diverse litigation like *Agent Orange*. Personal injury suits are typically governed by state substantive law.[21] In multistate tort cases, state courts rely on a variety of choice-of-law approaches to determine which states' substantive laws control.[22] The rigid *Erie* doctrine[23] requires federal judges sitting in diversity[24] to do as their state

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1985). By September 1984 federal courts had already made over 4,000 docket entries in *Agent Orange* litigation. *Agent Orange*, 597 F. Supp. at 750.

[20] *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (suit by guest passenger, a New York resident, for injuries sustained in Ontario, Canada automobile accident).

[21] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). *See generally* PROSSER AND KEETON ON THE LAW OF TORTS (W. Keeton 5th ed. 1984) (comprehensive treatise on state tort laws).

[22] "When a case involving foreign (out-of-state) aspects arises . . . the problem becomes whether to ignore the foreign element and to treat the case as arising under local law, or to [give] weight to the foreign element[s] . . . applying foreign law." E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.1, at 5 (Lawyer's ed. 1984). *See infra* part III A.

[23] *Erie*, 304 U.S. 64. *Erie* largely reversed a 96 year trend of federal judicial lawmaking that began under the rule of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (Story, J.). The *Swift* rule allowed judges to create federal law that might conflict with state law when legal questions were "of a . . . general nature" and not "strictly local." *Id.* at 18-19. The stated justification for the *Swift* rule was the need or desirability of uniform law throughout the country. *Id.*

Speaking for the *Erie* Court, Justice Brandeis announced that the Constitution requires courts to use state law in cases arising under diversity jurisdiction. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie*, 304 U.S. at 78. Subsequent cases and legion scholarship demonstrate that courts had difficulty applying this standard. *See infra* note 90. The Supreme Court itself seemed to send out incongruous messages. In fact, the same day that it handed down *Erie*, the Court held that questions regarding apportionment of water in an interstate stream were still to be decided by federal common law. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). Therefore, federal judges could still create federal common law in limited situations. *See infra* notes 90-99 and accompanying text.

Five decisions in nearly as many decades have refined the *Erie* doctrine. Hanna v. Plumer, 380 U.S. 460 (1965) (holding that FED. R. CIV. P. 4 controls over state rules on service of process in diversity cases); Van Dusen v. Barrack, 376 U.S. 612 (1964) (federal court in consolidated diversity case must apply conflict of laws rules of state where that action originated); Byrd v. Blue Ridge Rural Coop., 356 U.S. 525 (1958) ("affirmative countervailing considerations" require federal jury trial, although state would not provide jury trial); Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945) (state statute of limitations applies in diversity action founded on state substantive right); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (federal court in diversity case must apply conflict of laws rules of state in which federal court sits). *Erie* is preeminent and controversial in modern federal litigation as well as in legal scholar-

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brethren do. *Erie* is complemented by *Klaxon v. Stentor*,[25] which requires federal judges to use the whole law, including the choice-of-law method, of the state in which they sit. If the consolidated suits before one federal court originated in more than one state, *Van Dusen v. Barrack*[26] requires the federal judge to apply different conflicts and substantive rules to suits from each state. When, as in *Agent Orange*, hundreds of suits from dozens of states end up in a single federal court,[27] the task imposed by *Erie*, *Klaxon*, and *Van Dusen* can become unworkable and unacceptable.[28] If the states' laws differ, too many laws will apply.[29]

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ship. Some of the more interesting works discussing *Erie* and the creation of common law after *Erie* include Brown, *Of Activism and* Erie *— The Implication Doctrine's Implications for the Nature and Role of Federal Courts*, 69 IOWA L. REV. 617 (1984); Clark, *supra* note 1; Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Friendly, *In Praise of* Erie *— And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U.L. REV. 541 (1958); Kurland, *The* Romero *Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817 (1960); Mishkin, *The Variousness of Federal Law: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967); Comment, *Federal Common Law and Article III: A Jurisdictional Approach to* Erie, 74 YALE L.J. 325 (1964) [hereafter Comment, *Federal Common Law and Article III*]; Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969) [hereafter Note, *The Federal Common Law*]; Note, *Exceptions to* Erie v. Tompkins: *The Survival of Federal Common Law*, 59 HARV. L. REV. 966 (1946).

The *Erie* doctrine has been variously interpreted to apply solely to diversity cases or to cases arising under federal question jurisdiction, 28 U.S.C. § 1331 (1982), depending on whom one believes. *See* Westen & Lehman, *supra*, at 313 nn.9 & 10 and sources there cited; *infra* note 92 and accompanying text. For a brief discussion of *Erie*'s policy concerns, see *infra* text accompanying notes 49-51.

[24] 28 U.S.C. § 1332 (1982) (allowing federal subject matter jurisdiction if litigants are citizens of different states).

[25] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). *See infra* text accompanying notes 52-56.

[26] 376 U.S. 612 (1964). *See infra* text accompanying notes 57-66.

[27] 580 F. Supp. 690, 700-01.

[28] *See infra* part I B.

[29] Applying many states' laws to similar claims can create disparate results. For example, defendants might need to litigate dozens of similar suits under different laws before one court and the judgments could subject defendants to conflicting liabilities. Taken together, judgments under separate states' punitive damages rules might completely exhaust defendants' assets. Therefore, plaintiffs that receive judgment first might be the only ones compensated. *See* Jackson v. Johns-Manville Sales Corp., 750

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The need for consistent decisional rules in cases like *Agent Orange* is readily apparent; federal common law is sometimes an appropriate device for creating uniform rules.[30] In *Agent Orange*, however, the Second Circuit found insufficient federal interest to justify fashioning federal common law.[31] Because there was no applicable federal statute[32] and the court lacked the power to make federal common law, a fair resolution of the litigation seemed impossible.[33] Applying dozens of states' laws to thousands of claims in one federal court would have been unmanageable and unjust.[34]

Chief Judge Weinstein of the Eastern District of New York solved the *Agent Orange* choice-of-law dilemma when he predicted that every

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F.2d 1314 (5th Cir. 1985) (en banc), discussed *infra* text accompanying notes 156-62; *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (class action certification to enable defendants to face liability for only one punitive damages award vacated); *In re* Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) (class action certification on punitive damages issue vacated).

When forced to use multiple substantive laws and defenses, judges generally deny consolidation and class action treatment of mass disaster and toxic tort cases. *See* McDonnell Douglas Corp. v. United States, 523 F.2d 1083, 1085 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (district court class action certification vacated in mass aviation disaster suit); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975) (class action denied to suit involving air crash in New York); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975) (class action denied to suit involving air crash in Bali, Indonesia). *See also* FED. R. CIV. P. 23 advisory committee note, 39 F.R.D. 69, 103 (1966) (mass accidents ordinarily inappropriate for class action); MANUAL FOR COMPLEX LITIGATION § 1.51, at 82 (5th ed. 1982) (noting inconsistent class action treatment of air disasters); Note, *Class Actions and Mass Toxic Torts*, 8 COLUM. J. ENVTL. L. 269, 270, 285, 290 (1982) (class action certification is exception rather than rule in mass tort litigation).

[30] *See* 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514 (1982 & Supp. 1985); E. SCOLES & P. HAY, *supra* note 22, § 3.55, at 147; Note, *The Federal Common Law*, *supra* note 23, at 1512-13. *But cf. In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 993-94 (2d Cir. 1980) (noting that adoption of state law by federal courts in federal question cases arising under federal common law rights may lead to different rules in district courts).

[31] *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 993, *cert. denied*, 454 U.S. 1128 (1981). Plaintiffs claimed a federal common law right of action to invoke federal question jurisdiction, 28 U.S.C. § 1331 (1982). *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737 (E.D.N.Y. 1979). *See infra* part II A-B.

[32] Several federal acts address Agent Orange as a health concern, but none were sufficiently comprehensive to govern the federal litigation. *See Agent Orange*, 597 F. Supp. at 851-57 (listing legislative programs directed towards Agent Orange as a health problem); *Agent Orange*, 506 F. Supp. at 742 (federal legislation inappropriate for inference of federal common law remedies).

[33] *See infra* note 179 and accompanying text.

[34] *See infra* part I.

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state would apply national rules of decision to *Agent Orange*.[35] At first, this solution appears irreconcilable with *Erie*'s mandate to apply each state's law to claims from that state.[36] Yet Judge Weinstein explicitly invoked *Erie* and its progeny to reach his conclusion.[37] Ostensibly deferring to the *Erie* doctrine, he hypothesized that state courts would apply the same rules he applied to *Agent Orange*.[38] Each state court would recognize that the *Agent Orange* problem's overwhelmingly federal character demanded uniform national rules of decision.[39] If all state courts would apply such national rules, *Erie* would require the federal district court to do likewise.[40] Thus, Judge Weinstein's solution to the intractable choice-of-law problem is the hypothesis of a "national consensus law."[41]

National consensus law rests on the supposition that state courts will resolve particular legal issues under essentially the same law. States already had largely uniform rules to apply to some issues of the litigation.[42] Judge Weinstein suggested that state judges considering other issues likewise would resort to uniform nationwide rules, owing to the national character of the *Agent Orange* problem.[43] Because state judges making new law are free to seek guidance from many sources,[44] the judge assumed that they would probably follow the persuasive authority of federal courts and national legal institutions.[45]

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[35] *Agent Orange*, 580 F. Supp. 690 (Preliminary Memorandum on Conflicts of Law), discussed *infra* part III A.

[36] *See infra* part I A. Since states would use uniform rules, national consensus law ultimately resembles federal common law. *Agent Orange*, 580 F. Supp. at 697-713. However, while state courts must follow federal precedent on federal common law matters, *see* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30 § 4514, at 219, in *Agent Orange* Judge Weinstein predicted that state courts would arrive at uniform national rules without binding federal precedent. 580 F. Supp. at 710, 713.

[37] In particular, Judge Weinstein applied *Erie*, 304 U.S. 64, *Klaxon*, 313 U.S. 487, and *Van Dusen*, 376 U.S. 612. *See infra* part III A.

[38] *Agent Orange*, 580 F. Supp. at 697-713, discussed *infra* part III A.

[39] *Agent Orange*, 580 F. Supp. at 711-13.

[40] *See Erie*, 304 U.S. at 78.

[41] *Agent Orange*, 580 F. Supp. at 711-13.

[42] For example, the common law of products liability is virtually uniform nationwide. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 21, ch. 17, at 677-721 (common law development of state products liability doctrine); *see also Agent Orange*, 580 F. Supp. at 701 ("Virtually all . . . states . . . [have] adopted some form of products liability law . . . .").

[43] *Agent Orange*, 580 F. Supp. at 697-713.

[44] 21 C.J.S. *Courts* § 204, at 354 (Supp. 1985). *See also* 20 AM. JUR. 2D *Courts* §§ 203-04 (Supp. 1985) (use of precedent from other states as secondary authority).

[45] *Agent Orange*, 580 F. Supp. at 710, 713.

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If federal courts embrace the notion of national consensus law, they can resolve many of the legal problems that arise in complex multistate litigation. However, because the *Agent Orange* litigants settled out of court, Judge Weinstein's analysis was not subjected to appellate review.[46] Thus, the national consensus law theory remains untested, and its potential utility for future litigation is unclear.[47]

This Note uses the *Agent Orange* case to examine choice-of-law problems in complex multidistrict federal litigation. It explores various sources of decisional law that could have been applied to the litigation, including state law, federal common law, and national consensus law. Part I discusses the problems that would have arisen if the federal court applied state law to the *Agent Orange* litigation.[48] Part II examines the plaintiffs' claim to federal question jurisdiction arising under a federal common law right of action and the Second Circuit's denial of that claim. Part III explains the legal bases of Judge Weinstein's decision to apply national consensus law to *Agent Orange*. This Note concludes that, without congressional action, national consensus law is the only approach to complex multidistrict dispute resolution that avoids the problem-ridden federal common law and fulfills *Erie*'s mandate to apply state law.

I. APPLYING STATE LAW TO *Agent Orange*

To examine the option of applying state law to the *Agent Orange* litigation, this part first outlines the principles for applying state law in multistate federal diversity actions. It then discusses the serious problems that would have resulted had the court applied different state

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[46] *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, (E.D.N.Y. 1985) (Weinstein, C.J.) ("Memorandum and Order on Attorney Fees and Final Judgment," reaffirming preliminary settlement). *See also Agent Orange*, 597 F. Supp. 740 (preliminary memorandum on settlement). *See infra* note 201 (regarding settlement).

[47] Perhaps Judge Weinstein fashioned his national consensus law theory to ensure that the parties would settle. However, given near agreement among judges and commentators that the plaintiffs' claims would fail, Judge Weinstein certainly anticipated scrutiny. Moreover, it appears that when Judge Weinstein wrote his conflicts opinion, he expected the litigation to continue. More than six months later, he noted that "[i]t is obvious that since no appellate court has passed on this [national consensus law] theory, the probability of appeal and possible reversal or modification is substantial, making settlement more appropriate." *Agent Orange*, 597 F. Supp. at 755. *See generally id.* at 775-816 (discussing "Factual Problems with Claims," "Legal Problems with Claims" in settlement context).

[48] Plaintiffs first were denied federal question jurisdiction under a federal common law right of action. *Agent Orange*, 635 F.2d 987.

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laws to the *Agent Orange* litigation. This part concludes that application of different state laws to the *Agent Orange* litigation was unworkable.

A. *Applying* Erie*'s State Law*

Federal courts are bound to follow the rule of *Erie v. Tompkins*,[49] which requires them to apply state law in diversity cases. *Erie* was premised on the principle that deference to state substantive law would achieve intrastate uniformity of result[50] and thereby discourage forum shopping.[51]

To implement *Erie*'s policies, federal courts needed to identify which state's law governed diversity cases. When legally significant events occur in more than one state, or when a party sues in a state other than

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[49] 304 U.S. 64 (1938). *See supra* note 23.

[50] *Erie* condemned federal court lawmaking practices that could lead to two conflicting rules potentially applicable to the same transaction. *Erie*, 304 U.S. at 78. Before *Erie*, the applicable law depended only on whether litigants filed in state or federal court. *Id. See also* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . . ."). Of course, because each court adheres to its own procedural rules, outcomes differ between state and federal courts.

[51] *See Erie*, 304 U.S. at 76-80 (discussing the forum shopping that diversity encouraged).

Whether the *Erie* rule was constitutionally mandated is unclear. The majority of modern scholars claim that article III of the Constitution and the Federal Judiciary Act of 1789 required *Erie*. Brown, *supra* note 23, at 619-20; Ely, *supra* note 23, at 703; Friendly, *supra* note 23, at 384. But the constitutional basis has not always been so secure from criticism. Judge Clark considered *Erie*'s constitutional basis dictum. Clark, *supra* note 1, at 278. In his 1946 lecture-article, he noted:

> [T]he [*Swift*] rule developed as a result of pressures fairly natural under the circumstances. The Court had and has to do with questions that transcend the artificial limits set by state boundary lines; even now, after the [*Erie*] decision, as we shall see, courts are troubled by what to do with cases involving names or property or wrongs in many states.

Id. at 276-77 (footnotes omitted). Judge Clark also stated that observers should have expected a drastic departure from Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), because lower federal courts had approached judicial lawmaking expansively under *Swift*. Clark, *supra*, at 277-78 (referring to Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), a highly criticized application of the *Swift* rule). The judge argued that the *Erie* shift was too violent a change for lasting success. Clark, *supra*, at 277-78. Other commentators suggested that Justice Story did not intend *Swift* to create federal common law rules different from state common law rules. *See* Westen & Lehman, *supra* note 23, at 338. If these commentators are correct, *Erie* did not call for a constitutional decision.

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that in which the events in question occurred, courts must decide which state's law is applicable.[52] Diversity cases in particular often pose conflicts issues.[53] *Erie*'s policies would be thwarted if federal courts simply applied a state's substantive law and not the state's conflicts approach. Results within each state would differ depending on whether litigants filed in state or in federal court.[54] By requiring federal courts to apply the conflict of laws rules of the state in which the court sits, *Klaxon v. Stentor*[55] provides a means for federal courts to reach results generally consistent with state decisions in most cases.[56]

A more complex problem arises when related cases from different states are consolidated in one federal court.[57] *Klaxon* implements *Erie*'s

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[52] *See generally* E. SCOLES & P. HAY, *supra* note 22 (comprehensive treatise on choice-of-law, or conflicts, methods).

[53] 28 U.S.C. § 1332 (1982). Federal diversity jurisdiction requires complete diversity of citizenship between adversarial parties. *Id.* Any two adversarial parties with citizenship in the same state will destroy diversity and render diversity jurisdiction unavailable. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

[54] *See, e.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941).

[55] 313 U.S. 487. The Supreme Court's 1975 decision in Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975) (per curiam), reconfirms that federal courts in diversity cases must apply state choice-of-law approaches.

[56] *Cf.* Griffin v. McCoach, 313 U.S. 498 (1941) (extending *Klaxon* rule to case arising under Federal Interpleader Act, 28 U.S.C. § 1335 (1982)). However, it was unclear which state's choice of law governed diversity cases transferred from the federal court of one state to the federal court of another. This problem restricted federal transfers. In some instances federal judges refused forum non conveniens transfers that would disadvantage plaintiffs, since a change of governing law might accompany federal change of venue. *See* cases cited in Van Dusen v. Barrack, 376 U.S. 612, 630 n.26 (1964). In other instances, judges conditioned transfers upon the parties' stipulation to use the transferor forum's law. *See* cases cited *id.* at 631 n.27.

In addition, it is an oversimplification to state that federal judges must apply the state court's conflicts approach. Judges within a state may employ various conflicts approaches. Recent cases demonstrate that even the same court may change methods several times, only to return to its original approach. *See, e.g.*, Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). In New York, for example, federal judges are hopelessly confused as they try to guess which method local state courts will employ next. *Compare Neumeier*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (applying lex loci delicti) *with* Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973) (Oakes, C.J.) (applying interest analysis as New York choice-of-law approach).

[57] Several procedures enable a single federal court to hear multiple cases filed in different courts. These procedures include federal interpleader, 28 U.S.C. § 1335 (1982); federal "forum non conveniens," 28 U.S.C. § 1404 (1982); venue transfers, 28 U.S.C. § 1406 (1982); multidistrict litigation, 28 U.S.C. § 1407 (1982); class action certification, FED. R. CIV. P. 23; and consolidation, FED. R. CIV. P. 42.

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policies in diversity cases when litigants file in just one court.[58] However, *Klaxon* does not identify which state's conflicts approach applies when the federal actions have originated in more than one state.[59]

In *Van Dusen v. Barrack*,[60] the Supreme Court formulated a rule to determine applicable state law for multistate federal cases. *Van Dusen* involved 150 lawsuits resulting from the crash of a commercial airliner into Boston Harbor.[61] Plaintiffs brought more than one hundred actions in the federal district court of Massachusetts[62] and forty-five or more actions in the Pennsylvania district court.[63] The Pennsylvania district court ordered transfer of venue to the district court of Massachusetts.[64] The Supreme Court held that the Massachusetts court must apply the transferor court's choice-of-law approach to suits originally filed in Pennsylvania.[65] Accordingly, even though every claim arose from one air crash, the Massachusetts court would have to apply Pennsylvania choice of law to lawsuits from Pennsylvania, and Massachusetts choice of law to suits from Massachusetts.[66]

Today, federal courts face increasingly complex multistate cases with attendant choice-of-law problems. The growing list of multistate cases includes mass tort claims involving injuries from exposure to asbestos and toxic chemicals,[67] as well as air crash litigation.[68] The *Agent Or-*

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[58] *See supra* text accompanying notes 54-56.

[59] *See, e.g.*, *Van Dusen*, 376 U.S. at 637-38 (seeking to refine *Klaxon*'s policy for related actions from two states in one federal court).

[60] 376 U.S. 612 (1964).

[61] *Id.* at 613-14.

[62] *Id.* at 614.

[63] *Id.*

[64] *Id.* The court of appeals vacated the district court's order and the Supreme Court granted certiorari. *Id.* at 614-15.

[65] *Id.* at 639, 644-46. The *Van Dusen* defendants had initially moved for change of venue. *Id.* at 614. The Court limited its holding to transfers sought by defendants when venue had been properly laid, reserving the question of plaintiffs' requests for transfer. *Id.* at 634, 639. *See generally* Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149 (1977) (tracing later application of *Van Dusen* rule to other types of transfers). *See also infra* note 73.

[66] *Van Dusen*, 376 U.S. at 639, 644-45.

[67] *See, e.g.*, Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983) (discussing the problem of varying punitive damage awards in different forums for the same product defect, in cases involving asbestos, formaldehyde, diethylstilbestrol (DES), Agent Orange, automobiles, tampons, and intrauterine contraceptive devices (IUD's)). For an example of multidistrict litigation that promises to raise some of these same issues, see *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 601 F. Supp. 1035 (J.P.M.D.L. 1985).

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ange problem demonstrates the difficulties that can result when federal courts apply the *Erie* doctrine in complex multidistrict litigation.

B. The Difficulty of Applying State Law to Agent Orange

The *Agent Orange* litigation comes within the scope of *Erie*, *Klaxon*, and *Van Dusen*. According to *Erie*'s rule for federal diversity cases,[69] state law governs *Agent Orange*.[70] Since state courts would apply their choice-of-law rules to the *Agent Orange* claims, *Klaxon* would require the district judge to use state choice-of-law rules.[71] In addition, the consolidated *Agent Orange* litigation came from dozens of states.[72] Therefore, *Van Dusen* would require the district judge to apply dozens of transferor states' choice-of-law rules to claims originating in each respective state.[73]

The need to apply independently each transferor state's law would have made the *Van Dusen*-mandated task in *Agent Orange* impossible.[74] Moreover, applying each state's law would have defeated the

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[68] *See In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594 (7th Cir. 1981); *In re* Air Crash Disaster at Wash. D.C. on Jan. 13, 1982, 559 F. Supp. 333 (D.D.C. 1983), discussed *infra* note 179; *In re* Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975), discussed *infra* note 204.

[69] *Erie*, 304 U.S. at 78.

[70] *See Agent Orange*, 100 F.R.D. 718.

[71] *Klaxon*, 313 U.S. at 496.

[72] *See supra* text accompanying note 18.

[73] *Van Dusen* requires application of the transferor court's state law notwithstanding change of venue, *see Van Dusen*, 376 U.S. at 639, with a possible exception for voluntary change of venue by plaintiffs. *Id.* at 639-40. All *Agent Orange* suits were transferred either for pretrial under the multidistrict litigation statute, 28 U.S.C. § 1407 (1982), or for convenience of witnesses, 28 U.S.C. § 1404 (1982). Thus, the *Van Dusen* rule clearly applied because plaintiffs had not requested transfer. *Agent Orange*, 580 F. Supp. at 695. The same reasoning applies to those who became plaintiffs by class action certification. *Id.*

See also In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594, 610 (applying choice-of-law rules of the originating state to claims transferred under 28 U.S.C. § 1404(a) (1982)); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 406 (2d Cir. 1975) (applying law of transferor courts to pretrial rulings in cases that Judicial Panel on Multidistrict Litigation transferred under 28 U.S.C. § 1407 (1982)).

[74] The *Agent Orange* court noted that seriatim trial of the claims would last well into the next century. *See Agent Orange*, 100 F.R.D. at 720 (modification of class action certification). Class action certification would be inappropriate under FED. R. CIV. P. 23(b) if it were necessary to apply different laws to each issue of every claim originating in a different state. *See* 100 F.R.D. at 724; *supra* note 29.

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purposes for consolidation.[75] The Supreme Court in *Van Dusen* suggested that applying different states' conflicts and substantive rules to related diversity actions could be difficult.[76] *Erie* and *Van Dusen*'s logic presupposes that both of these types of state rules vary.[77] Assuming substantial variation among applicable state rules, the *Agent Orange* court could not have followed the mandates of *Erie*, *Klaxon*, and *Van Dusen*. The Massachusetts court's task in *Van Dusen* was surmountable; the court needed to apply the rules of only two states.[78] In contrast, the *Agent Orange* claims originated in many state and foreign jurisdictions.[79] Using choice-of-law rules from each transferor state could have required the court to apply dozens of substantive laws to each issue.[80]

Applying dozens of different substantive laws to legally identical

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[75] *See Van Dusen*, 376 U.S. at 644-45. The purposes for consolidation under FED. R. CIV. P. 42(a) are to avoid unnecessary effort, costs, and delays. MANUAL FOR COMPLEX LITIGATION § 5.02, at 161 (5th ed. 1982). Transfer of cases under 28 U.S.C. § 1404(a) (1982) to a single court is allowed when venue permits "[f]or the convenience of parties and witnesses [and] in the interest of justice . . . ." *Id.* The MANUAL FOR COMPLEX LITIGATION § 5.22, at 165, also suggests that centralized management under § 1404(a) promotes efficiency. When a court must apply multiple substantive laws and defenses, consolidation and class action certification are generally inappropriate. *See* sources cited *supra* note 29.

[76] *Van Dusen*, 376 U.S. at 644-45 ("insofar as those [Pennsylvania] laws may be significantly different from the laws governing the cases already pending in Massachusetts, the feasibility of consolidation and the benefits therefrom may be substantially altered"). *See* David, *The International Unification of Private Law*, in *The Legal Systems of the World Their Comparison and Unification*, 2 INT'L ENC. COMP. L. ch. 5, at 14-15 (1971) (criticizing *Van Dusen* result, both on grounds of federal inequity and unmanageability).

[77] *See Erie*, 304 U.S. at 74 (common law varies among states). The entire *Van Dusen* controversy, whether transferee federal courts should apply transferee or transferor court's law, would have been unnecessary if state laws were uniform. *See Van Dusen*, 376 U.S. at 626-40. *See also supra* text accompanying notes 49-68.

[78] The *Van Dusen* Court did not suggest that Pennsylvania and Massachusetts choice-of-law rules might necessitate applying more than two states' laws. 376 U.S. 612. The Court considered transfer of Pennsylvania actions to Massachusetts appropriate because the plane crashed in Boston.

[79] *See supra* notes 16 & 18; *infra* notes 179 & 185 and accompanying text.

[80] This result is likely; many modern choice-of-law methods exist. While most methods share substantial similarities, the significant interests of each court exploring choice-of-law issues often lead courts to apply the *lex fori* — the forum's own law. This tendency has been described as "a powerful homing trend." *See* Juenger, *Leflar's Contributions to American Conflicts Law*, 31 S.C.L. REV. 413, 419 (1980). *See generally*, R. LEFLAR, AMERICAN CONFLICTS LAW § 20, at 191-82 (3d ed. 1977) (discussing tendency to apply *lex fori*).

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claims in a single court also would have led to disparate and inequitable results,[81] encouraging forum shopping.[82] Under *Van Dusen*, the content of governing law depends on the conflicts rules of the state where each plaintiff files suit.[83] This ensures uniformity among claims originating in one state.[84] However, since the *Agent Orange* chemical manufacturer defendants could be sued in every state,[85] results would have varied dramatically nationwide depending on the forum shopping skills of counsel.[86] Disparate outcomes, turning only on the state of original venue, would contravene *Erie*'s policies against forum shopping.[87] For one court to apply dozens of state laws to the massive *Agent Orange* diversity tort litigation was therefore theoretically undesirable, as well as literally unmanageable.[88]

II. Applying Federal Common Law to *Agent Orange*

The application of federal common law sometimes eliminates management problems and inequitable results in complex multidistrict litigation. After *Erie*, the need for uniform substantive rules in special disputes prompted federal judges to create federal common law.[89] Yet the propriety of federal judges creating post-*Erie* federal common law has long been problematic.[90]

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[81] *See Agent Orange*, 635 F.2d at 996 (Feinberg, C.J., dissenting); *Agent Orange*, 580 F. Supp. at 703 (Weinstein, C.J.); *Agent Orange*, 506 F. Supp. at 748 n.7 (Pratt, J.); David, *supra* note 76, at 14-15. *Cf.* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977) (applying federal common law to soldier's tort claim to avoid results turning on "the fortuity of where the soldier happened to be stationed at the time of his injury").

[82] *Cf. Erie*, 304 U.S. at 76-77.

[83] *See supra* text accompanying notes 60-66.

[84] *See, e.g., Van Dusen*, 376 U.S. at 638-39 *passim*.

[85] *Agent Orange*, 580 F. Supp. at 700.

[86] *See supra* note 77 and accompanying text.

[87] *See supra* text accompanying notes 49-51.

[88] *See, e.g., Agent Orange*, 506 F. Supp. at 749 (district Judge Pratt sustaining plaintiffs' federal common law right of action to avoid applying many disparate state laws). *But see Agent Orange*, 635 F.2d 987 (Feinberg, C.J., dissenting) (reversing district court ruling); *infra* text accompanying notes 155-61; *see also Agent Orange*, 580 F. Supp. at 700-13; *supra* note 29.

[89] *See* sources cited *supra* note 23.

[90] Some judges have tried to explain post-*Erie* federal common law as if there were a straightforward rule to determine when its application is proper. *See, e.g.*, Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) (discussing whether Lanham Act, 15 U.S.C. §§ 1051-1127 (1947) authorized creation of a federal common law of unfair competition):

> It is the *source* of the right sued upon, and not the ground on which

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The existence of strong federal interests in a special subject area is the touchstone for federal common law.[91] A federal judge may create common law when the Constitution authorizes it[92] or when the federal

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> federal jurisdiction over the case is founded, which determines the governing law. . . . Thus, the [*Erie*] doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. . . . Likewise, the [*Erie*] doctrine is inapplicable to claims or issues governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship.

Id. (emphasis in original). But other eminent authorities have disagreed. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514, at 221-23. ("[W]hether state law or federal law controls on matters not covered by the Constitution or an Act of Congress is a very complicated question, one that does not yield to any simple answer in terms of the parties to the suit, the basis of subject matter jurisdiction, or the source of the right that is to be enforced."). *See also* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 79 (1980); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1084 (1964).

[91] *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514; Note, *The Federal Common Law*, *supra* note 23. *See generally* sources cited *supra* note 23.

[92] *See* Comment, *Federal Common Law and Article III*, *supra* note 23, at 330-57. In the broadest sense, the federal courts have constitutional power to make law that falls within congressional power. *Id.* Only the Rules of Decision Act, 28 U.S.C. § 1652 (1982), limits this power. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514; Comment, *Federal Common Law and Article III*, *supra*. In some cases, constitutional grants of jurisdiction to the federal courts become authority to create substantive law, as is true for cases arising in admiralty. *See, e.g.*, Southern Pacific Co. v. Jensen, 244 U.S. 205, 214-15 (1917). *Accord*, Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77 (1981) (similar treatment for admiralty after *Erie*). In other cases, courts are construing federal statutory standards, such as the use of "Manipulative and Deceptive Devices" in connection with the "purchase or sale of securities," outlined in § 10(b) of the Securities Exchange Act of 1939, 15 U.S.C. § 78j(b) (1982). The supremacy clause, U.S. CONST. art. VI, § 2, ensures that congressionally authorized federal judge-made law supersedes state law. *See* Free v. Bland, 369 U.S. 663 (1962); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). "The new federal common law is binding on the states, and therefore does not fall within the direct ban of Erie Railroad v. Tompkins." Note, *The Federal Common Law*, *supra* note 23, at 1512 (citation omitted).

When courts "make law" drawing directly on constitutional sources, their interpretations are final. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). When they draw on statutes or declare common law, the courts attempt to speak for the legislature. As a result, the legislature may override judge-made law that draws interpretive power from nonconstitutional sources. *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (Congress repealed statutory power of Supreme Court to hear appeal; although the Court had already heard the case, it could not issue judgment); *accord*, *Northwest Airlines*, 451 U.S. 77. "[T]he measure in each case is whether the law declared by the courts is consistent with prevailing legislative policy." Westen & Lehman, *supra* note 23, at 336 (emphasis omitted).

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government has an overriding interest in applying uniform substantive law to the case subject matter.[93] If applying state law would seriously interfere with important federal interests, subjecting the rights and duties of the United States to "exceptional uncertainty," the federal interest is sufficient.[94] A federal court may invoke federal common law for

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[93] Federal courts have upheld federal common law based on uniformity interests with varying consistency. For example, the courts have consistently found an interest in uniformity in foreign affairs matters. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine). For commentary on *Sabbatino*, see Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 831 (1964) (describing *Sabbatino* as the first case of federal common lawmaking without congressional authorization); Horowitz, *Toward a Federal Common Law Choice of Law*, 14 UCLA L. REV. 1191, 1200-03 (1967); Kurland, *supra* note 23, at 831; Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 273-75; Comment, *Federal Common Law and Article III*, *supra* note 23, at 334-35. Courts have also applied federal common law consistently to disputes involving interests enunciated in congressional labor policies. *See, e.g.*, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). *Lincoln Mills* paved the way for an entire body of federal common law regarding judicial enforcement of collective bargaining agreements. For general commentary on this body of law, see Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959); Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of the Law Under Section 301*, 28 U. CHI. L. REV. 707 (1961). For criticism of *Lincoln Mills*, see Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957). For support of *Lincoln Mills*, see Note, *The Federal Common Law*, *supra* note 23, at 1531-35. Courts have applied federal common law inconsistently to other disputes, including litigation over government-issued securities. *Compare* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (applying federal common law) *with* Bank of America v. Parnell, 352 U.S. 29 (1956) (not applying federal common law because government was not party to suit). Courts have applied federal common law inconsistently to disputes involving interstate pollution, government property rights, and implied rights of action under federal securities regulations. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514, at 224 *passim*; Note, *The Federal Common Law*, *supra* note 23.

[94] *Clearfield*, 318 U.S. at 367. In *Clearfield*, the Court developed a theory of federal interest in uniformity to determine that applying federal common law was proper. The dispute was over a check that the United States issued. A third party stole the check and cashed it with a forged endorsement. The defendant bank had guaranteed prior endorsements.

The Supreme Court held that federal common law controlled the case, confirming that the federal government has a strong interest in the rights and obligations of the United States connected with federally issued commercial paper. The Court reasoned that since the United States exercises constitutional power when issuing commercial paper, courts had authority to make federal substantive rules beyond the scope of *Erie*. *Id.* at 366. However, the Court also limited its rule by focussing on a second important element, the federal interest in uniform law to govern the dispute. *Id.* at 367. Thus, *Clearfield* announced a major refinement in federal common law application by articulating the interest in uniformity rationale.

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either jurisdictional or substantive law purposes, or for both.[95] In each instance, the strength of the federal interest in a uniform law determines whether federal common law is permissible.[96]

Eastern District Chief Judge Weinstein's decision addressed choice of substantive law. Before considering choice-of-law questions, the district court and Second Circuit examined the *Agent Orange* federal common law question in a jurisdictional context.[97] Since the federal interest in uniform law is equally central to federal jurisdiction and choice of law, the Second Circuit's jurisdictional ruling became law of the case,[98] prohibiting the substantive use of federal common law to govern *Agent Orange*.[99]

A. Agent Orange *and Federal Common Law in the District Court*

In February 1979 the *Agent Orange* plaintiffs filed a 162 page complaint,[100] asserting federal question jurisdiction.[101] Plaintiffs based jurisdiction on implied private rights of action from federal statutes and on federal common law.[102] Defendants disputed plaintiffs' federal com-

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When a uniform federal common law rule applies, policies underlying the *Erie* doctrine's state law preference are either achieved or overridden by federal interests. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514, at 224-25; Note, *The Federal Common Law*, *supra* note 23, at 1515-26 (noting that *Erie*'s state law preference is due to the federalist balance of judicial power, the advantages of locally derived substantive solutions to local problems, the protection of state policies, and the predictive value of the corpus of state law). *See also* E. SCOLES & P. HAY, *supra* note 22, § 3.55, at 147 (outlining test for federal common law application in diversity cases).

[95] *Agent Orange*, 580 F. Supp. at 694. *See* E. SCOLES & P. HAY, *supra* note 30, § 3.55, at 146; C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514, at 220 *passim*.

[96] Courts use virtually the same test to determine whether federal common law applies for jurisdictional purposes and whether federal common law will substantively govern. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514, at 223; Note, *The Federal Common Law*, *supra* note 23.

[97] *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737 (E.D.N.Y. 1979) (Pratt, J.), *rev'd*, 635 F.2d 987 (2d Cir. 1980) *cert. denied*, 454 U.S. 1128 (1981).

[98] *Agent Orange*, 635 F.2d 987.

[99] *Agent Orange*, 580 F. Supp. at 694.

[100] *See Agent Orange*, 597 F. Supp. at 750.

[101] 28 U.S.C. § 1331 (1982).

[102] *Agent Orange*, 506 F. Supp. at 740. Plaintiffs first argued for federal question jurisdiction on the grounds of an implied private right of action from congressional statutes regulating pesticides, environmental hazards, toxic substances, and consumer safety. *Id.* at 740-42. In their third verified amended complaint, plaintiffs also claimed federal question jurisdiction based on *Clearfield*, 318 U.S. 363, and on the line of federal common law cases finding on overriding interest in uniformity. 506 F. Supp. at

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mon law jurisdictional claim,[103] and district court Judge George C. Pratt, Jr. dismissed plaintiffs' statute-based claim to jurisdiction.[104] However, Judge Pratt sustained federal question jurisdiction[105] over *Agent Orange* based on a cause of action arising under federal common law.[106]

After extensively analyzing the Supreme Court's decisions,[107] Judge Pratt noted that the Court has not enunciated precise, consistent standards for applying federal common law to private party litigation.[108] For example, the Court recently conditioned federal common law ap-

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743.

[103] Defendants disputed the plaintiffs' jurisdiction claim on two grounds. First, defendants argued that the interest in uniformity was present only in disputes to which the government was a party. *Agent Orange*, 506 F. Supp. at 743. Alternatively, defendants argued that even if the plaintiffs outlined the correct standard, their case fell short of the requirements. *Id.* at 744.

Defendants made third party claims against the government for contribution and indemnity based on the government's alleged misuse of the chemicals and the government's superior knowledge about the hazards that misuse created. District Judge Pratt dismissed the third party claims pursuant to the *Feres-Stencel* doctrine and the Federal Tort Claims Act. *Agent Orange*, 506 F. Supp. at 774; *see* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977); Feres v. United States, 340 U.S. 135 (1950). The judge reasoned that since the veterans' claims arose from military actions not compensible under the Tort Claims Act, the munitions suppliers could not obtain contribution from the government based derivatively on barred servicemen's claims. *Agent Orange*, 506 F. Supp. at 774. The plaintiffs' complaint also alleged direct injuries to veterans' families. Judge Pratt dismissed the defendants' third party actions against the government for these claims, holding them barred also under the Federal Tort Claims Act, *Feres*, and *Stencel Aero*. *Agent Orange*, 506 F. Supp. 762 (E.D.N.Y. 1980), *petition for rearg. denied*, 534 F. Supp. 1046 (E.D.N.Y. 1982), *modified*, 580 F. Supp. 1242 (E.D.N.Y. 1984).

[104] *Agent Orange*, 506 F. Supp. 737, 741-42. Applying the test for implied rights of action developed in Cort v. Ash, 422 U.S. 66, 78 (1975), the judge rejected each of the plaintiffs' statute-based claims. Using the second branch of the *Cort* test, he found that Congress did not intend to provide a private remedy or right of action from the statutes. 506 F. Supp. at 742.

[105] 28 U.S.C. § 1331 (1982).

[106] *Agent Orange*, 506 F. Supp. at 744. Disagreeing with both the defendants' and plaintiffs' analyses, Judge Pratt sustained the federal common law claim to federal question jurisdiction based on cases more recent than those that plaintiffs suggested. Judge Pratt rejected application of *Clearfield*, 318 U.S. 363, in favor of Miree v. DeKalb County, 433 U.S. 25 (1977) (discussed *infra* note 134), and Wallis v. Pan Am. Corp., 384 U.S. 63 (1966). 506 F. Supp. at 744-46.

[107] Principally, Judge Pratt used Miree v. DeKalb County, 433 U.S. 25, Wallis v. Pan Am. Corp., 384 U.S. 63, and United States v. Standard Oil Co., 332 U.S. 301 (1947). *Agent Orange*, 506 F. Supp. 737, 744-47.

[108] *Agent Orange*, 506 F. Supp. at 744-46.

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plication variously on whether disparate or uncertain state law would potentially burden federal operations, whether the federal government has important rights or duties hinging on the litigation, or whether application of state law would significantly infringe on federal interests.[109] Judge Pratt used this precedent[110] to synthesize a framework of three considerations "crucial" to applying federal common law: "(1) the existence of substantial federal interest in the outcome of the litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law."[111]

Judge Pratt found two factors supporting a substantial federal interest in the outcome of *Agent Orange*.[112] First, citing federal common law precedent involving third party injuries to servicemen, he noted the distinctively federal character of the government-serviceperson relationship.[113] Second, Judge Pratt emphasized practical considerations that supported a substantial federal interest. While the federal statute for compensation of service-related injuries did not cover veterans' spouses, children, and parents, federal interests obviously were implicated in

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[109] *Miree*, 433 U.S. at 31-32 (quoting *Wallis*, 384 U.S. at 68). *See Agent Orange*, 506 F. Supp. at 745.

[110] Judge Pratt also noted Chief Justice Burger's *Miree* concurrence, 433 U.S. at 34, in which the Chief Justice intimated that certain conditions might merit applying federal common law "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." 506 F. Supp. at 745 (quoting Burger, C.J., concurring) (citation omitted).

[111] *Agent Orange*, 506 F. Supp. at 746.

[112] *Id.* at 746-47.

[113] *Id.* at 746.

> Perhaps no relation between the Government and a citizen is more distinctively 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 between persons in [the] service and the government are fundamentally derived from federal sources and governed by federal authority. 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 powers equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

Id. (quoting United States v. Standard Oil Co., 332 U.S. at 305-06) (citations omitted) (footnotes omitted).

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these injuries.[114] Another practical consideration was the federal government's interest in matters that would significantly affect military contractors.[115] The government had no substantial interest in whether the contractors were liable generally.[116] However, the tremendous size of the plaintiff class created a substantial federal interest in the litigation's outcome.[117] A judgment against military suppliers would impair the United States ability to buy military ordnance and even affect other sectors of the national economy.[118]

Applying the second prong of his federal common law test, Judge Pratt found that using different state laws would impermissibly burden federal interests.[119] Disparate results under each state's law would undermine the federal interest in anticipating the rights and liabilities of veterans and military contractors.[120] Additionally, disparate results would interfere with the federal interest in treating similarly situated litigants in a similar fashion.[121]

In the third part of his analysis, Judge Pratt concluded that using federal common law would affect no state interests[122] because no body of state law would be displaced.[123] Defendants insisted that state law governed the litigation[124] and that application of federal common law to mass tort claims was unprecedented.[125] In response Judge Pratt cited *Agent Orange*'s novel character, stating, "[it] may be that no tort claim has heretofore implicated such significant federal interests involving so many persons in an area so little regulated by state law."[126]

Judge Pratt thus found "ample justification for application of federal common law to [*Agent Orange*]."[127] However, the Second Circuit was

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[114] *Agent Orange*, 506 F. Supp. at 746-47 (referring to 38 U.S.C. § 30 (1982)).

[115] *Agent Orange*, 506 F. Supp. at 747-48.

[116] *Id.*

[117] *Id.*

[118] *Id.* Among the defendants were five of the nation's largest chemical manufacturers. Aggregated claims might have exceeded billions of dollars. *Id.* at 747 n.5.

[119] *Id.* at 748.

[120] *Id.*

[121] *Id.* at 748 n.7.

[122] *Id.* at 748-49.

[123] "[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.* at 749.

[124] *Cf.* sources cited *supra* note 29.

[125] *Agent Orange*, 506 F. Supp. at 749.

[126] *Id.*

[127] *Id.* at 749-50.

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not similarly convinced.[128]

B. Agent Orange *and Federal Common Law on Appeal*[129]

The Second Circuit reversed the district court's ruling that an identifiable federal policy warranted using federal common law rules. Even applying Judge Pratt's three-pronged test, the appellate court found no substantial federal interest.[130] The appellate court therefore prohibited application of federal common law to *Agent Orange*.[131]

The court distinguished *Agent Orange* both from cases finding a federal interest in uniformity[132] and from cases relying on the federal character of the government-serviceperson relationship.[133] The court asserted that "[t]here is no federal interest in uniformity. . . . [s]ince this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome . . . ."[134] The court further

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[128] The Second Circuit reversed, with Chief Judge Feinberg dissenting. *Agent Orange*, 635 F.2d 987, 988 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). *See infra* part II B.

[129] *Agent Orange*, 635 F.2d 987. Judge Pratt certified his jurisdictional ruling for interlocutory review, 28 U.S.C. § 1292(b) (1982). 635 F.2d at 988.

[130] "[W]e . . . conclude that the court gave insufficient weight to the Supreme Court's repeated admonition that '. . .the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.*'" 635 F.2d at 993 (quoting *Wallis*, 384 U.S. at 68, quoted with emphasis in *Miree*, 433 U.S. at 31).

[131] The circuit court considered both of the plaintiffs' jurisdictional claims, agreeing with Judge Pratt that implication of remedies from statutes was improper. *Agent Orange*, 635 F.2d at 991 n.9.

[132] *Id.* at 993-94.

[133] *Id.* at 994-95. The circuit court claimed that the suit did not implicate rights and duties of the United States directly because the government was not a party to the litigation.

[134] *Id.* The court relied on Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956), for the proposition that *Agent Orange* did not implicate federal interests in uniformity. Like *Clearfield*, discussed *supra* note 94, *Parnell* involved government-issued securities. The bank sued Parnell to recover funds that he obtained by cashing stolen bonds. Following the *Clearfield* rationale that courts should interpret transactions involving government-issued commercial paper under a uniform federal rule, the Court of Appeals applied federal law to determine whether Parnell took the bonds in good faith. The Supreme Court reversed, declaring that the "litigation is purely between private parties and does not touch the rights and duties of the United States." *Id.* at 33. However, the *Parnell* Court later noted, "[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 because it is a suit between private parties." *Id.* at 34. This equivocal language likely contributes to the confusion over whether the government must be a litigant before there is sufficient

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noted that even when federal interests justify applying federal common law, district courts sometimes adopt state substantive rules.[135] Consequently, the appellate court claimed that jurisdiction under federal common law would not ensure uniformity.[136]

The Second Circuit found no "identifiable"[137] federal interest in *Agent Orange*'s outcome, yet noted that "obvious" federal interests existed in the case.[138] While the federal interest in protecting government contractors was substantial, the federal interest in the health of servicepersons was also substantial.[139] The court asserted, however, that these two federal interests were completely at odds.[140] An outcome favorable to plaintiffs would interfere with military suppliers;[141] on the other hand, if defendants did not compensate veterans injured during

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federal interest in uniformity to apply federal common law. *Compare Miree*, 433 U.S. at 30, *Parnell*, 352 U.S. 29, *Standard Oil*, 332 U.S. 301 (government a party, federal common law applies), *and Clearfield*, 318 U.S. 363 (same) *with* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (government not a party, federal common law applies), Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (same), *and* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) (same). For historical analysis of this issue see Henkin, *supra* note 93; Kurland, *supra* note 23, at 831; Mishkin, *supra* note 23, at 801-02; Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601, 613 (1980).

The requirement that the government be party to the case reappeared in *Miree*, 433 U.S. 25. In *Miree*, Justice Rehnquist cited both *Parnell* and Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966), when petitioners invoked *Clearfield* to support federal common law. Even though petitioners filed related actions directly against the government, the Court held that "[s]ince only the rights of private litigants are at issue here, we find the Clearfield Trust rationale inapplicable." *Miree*, 433 U.S. at 30. Mr. Chief Justice Burger concurred separately, criticizing Rehnquist's overzealous circumscription of federal common law. In his brief discussion, Chief Justice Burger noted, "I cannot read [*Clearfield* and *Parnell*] as, in all circumstances, precluding the application of 'federal common law' to all matters involving only the rights of private citizens." *Id.* at 34 (Burger, C.J., concurring).

[135] *Agent Orange*, 635 F.2d at 994 (citing Auto Workers v. Hoosier Corp., 383 U.S. 696, 701-05 (1966), in which the Court held that although federal common law governed, *see* Textile Workers v. Lincoln Mills, 353 U.S. 488 (1957), district court should apply local state's statute of limitations).

[136] *Agent Orange*, 635 F.2d at 994. The court did not explain why this concern precluded using federal common law in *Agent Orange*, but did not preclude using federal common law in Supreme Court precedents that have found such law permissible. *See* cases cited in C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514.

[137] *See Agent Orange*, 635 F.2d at 995.

[138] *Id.*

[139] *Id.* at 994-95.

[140] *Id.* at 994.

[141] The Second Circuit also mentioned that the possibility of government indemnification of defendants was a factor contributing to federal interest. *Id.*

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active duty, government agencies would shoulder the burden of their medical costs.[142] The court did not identify the contraposing federal interests in further detail, claiming that only Congress could create a policy to balance them.[143] With no identifiable federal interest in *Agent Orange*'s outcome, the case failed to meet the first requirement of Judge Pratt's test.[144]

The circuit court's reversal meant that the litigation could not rest on federal question jurisdiction grounded on federal common law. Strongly supporting district Judge Pratt's ruling, Second Circuit Chief Judge Feinberg noted in his dissent, "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."[145]

The Second Circuit and district Judge Pratt applied the same precedents, but their analyses differed in two major respects.[146] First, the circuit court held that Supreme Court precedent required the government to be a litigant before a strong federal interest in uniform rules of decision could exist;[147] Judge Pratt disagreed.[148] Second, while the circuit court found that state law application would not threaten federal interests, Judge Pratt found the threat sufficiently concrete to identify a federal interest in the case's outcome.[149] The Second Circuit's finding has been unpopular among commentators.[150] However, given substan-

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[142] *Id.* In fact, while settlement of the case for $180 million may relieve the government of some of its burden, the government already spends $70 million yearly on medical treatment for veterans who claim Agent Orange exposure. The government is also spending $150 million on research to determine the medical effects of Agent Orange and of military service in Vietnam. *Agent Orange*, 597 F. Supp. at 750.

[143] *Agent Orange*, 635 F.2d at 994-95.

[144] *Id.* at 995.

[145] *Id.* at 996 (Feinberg, C.J., dissenting).

[146] *See supra* notes 107-44 and accompanying text.

[147] *See supra* note 134 and accompanying text.

[148] *Agent Orange*, 506 F. Supp. at 749.

[149] *Compare Agent Orange*, 635 F.2d at 993-95, *with Agent Orange*, 506 F. Supp. at 746-49.

[150] *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 30, § 4514, at 233-34 (criticizing two of the circuit court's grounds for federal common law reversal); Note, *The Agent Orange Litigation*, *supra* note 12; Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601 (1980). The Second Circuit's prohibition of federal common law in *Agent Orange* was anomalous as well as unpopular. Federal agencies have spent millions of dollars handling serious dioxin contamination catastrophes that have affected civilians. The United States EPA purchased an entire town, Times Beach, Missouri, for approximately $36 million. Garmon, *The Buying of Times Beach: A Town Unfit for Human Beings*, 123 SCI. NEWS 132 (1983); Garmon, *Times Beach: The Long Road to Recov-*

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tial inconsistencies in federal common law precedent, it is no surprise that the appellate court denied the use of federal common law in *Agent Orange*.[151]

The *Agent Orange* district and circuit court opinions suggest that prudent judges cannot use uncertain and increasingly restrictive federal common law in novel or massive federal litigation. On the heels of an era of expansive common lawmaking,[152] the Supreme Court's own recent opinions have noted that the guidelines for applying federal common law are obscure, and the decisions contradictory.[153] Faced with the threat of reversal on unpredictable doctrinal grounds, federal judges exercise great caution.[154]

Other federal courts are similarly rejecting federal common law as the panacea for the problems of complex multistate litigation.[155] For

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ery, 123 SCI. NEWS 270 (1983); Sun, *Missouri's Costly Dioxin Lesson*, 219 SCI. 367 (1983). The cleaning-up of Love Canal and relocation of area residents have similarly involved monumental expenditure of government time and resources. *See* United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1073-79 (W.D.N.Y. 1982); A. HAY, THE CHEMICAL SCYTHE 229-43 (1982).

[151] *Agent Orange*, 635 F.2d 987. *See, e.g.*, Brown, *supra* note 23, at 635. "More is at stake than doctrinal purity or terminological nicety. Judges and litigants are pretty much in the dark . . . . [T]he Supreme Court engages in continuing reformulation of the [test to determine if implication of federal common law remedies from statutes is proper]." *Id.* (footnotes omitted).

[152] *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Kohr v. Allegheny Airlines, 504 F.2d 400, 404 (7th Cir. 1974). *See also* Brown, *supra* note 23, at 625-26.

[153] California v. Sierra Club, 451 U.S. 287, 302-03 (1981) (Rehnquist, J., concurring) (referring to lack of predictability, Justice Rehnquist noted that the Supreme Court reversed five of the six most recent cases in which circuit courts found implied rights of action). *See also supra* notes 90 & 134.

[154] *See infra* notes 156-62; *supra* notes 100-44 and accompanying text.

[155] Other articles discuss the *Erie* doctrine's modern limitations on federal common law. *See* Brown, *supra* note 23, at 617 *passim* and sources cited therein. Professor Brown notes that the modern *Erie* doctrine "serves as a precedential touchstone for the proposition that federal courts, unlike their state court counterparts, are not true common-law courts." *Id.* at 625. He notes that the Supreme Court's recent trend to restrict common law is not a sudden break from prior law, "but it surely is different in reading into *Erie* far more stringent limitations on the nature and role of federal courts than generally had been found before." *Id.* While supporting this shift, Professor Brown recognizes that "the vision of the federal judiciary articulated by Justices Powell and Rehnquist is fundamentally at odds with the vanguard of academic thinking," *id.* at 654, whose "cutting edge . . . advocates a broad common-law role for all courts in order to preserve the legal system." *Id.* at 618. *Compare* Wright, *supra* note 23, in which Judge Skelly Wright of the D.C. Circuit summarizes the arguments favoring an active common law role for federal courts. *See also* Westen & Lehman, *supra* note 23.

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example, the Fifth Circuit recently rejected a defendant's attempt to invoke federal common law in a strongly divided en banc decision arising from asbestos litigation.[156] In *Jackson v. Johns-Manville*[157] the court noted that more than 24,000 asbestos injury victims had filed suit by 1983, with 500 new filings per month.[158] Due to overwhelming litigation expenses, three of the nation's largest asbestos manufacturers petitioned for bankruptcy.[159] To avoid varying state punitive damage laws, which likely would exhaust all of their assets, the defendants tried to persuade the court to fashion federal common law, which would consider the collective effect of successive damage awards.[160] The asbestos cases' catastrophic injuries and high litigation costs today — to say nothing of projections for thirty years hence[161]— militate for a uniform federal law to apply to the victims' claims. Like *Agent Orange*, the *Johns-Manville* case involved private defendants but also implicated the government.[162] If *Johns-Manville* and *Agent Orange* lacked sufficient federal interest for federal common law, it is hard to imagine applying federal common law to any massive or novel private litigation.

C. *Federal Common Law Application to* Agent Orange *as a Diversity Class Action*

Although the Second Circuit denied federal jurisdiction based on federal common law, diversity jurisdiction was still available.[163] The circuit court examined federal common law for jurisdictional purposes

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[156] Jackson v. Johns-Manville Corp., 750 F.2d 1314 (5th Cir. 1985) (en banc).

[157] *Id.*

[158] *Id.* at 1336 (Clark, C.J., dissenting).

[159] *Id.* at 1330 n.2.

[160] *Id.* at 1324, 1329-30. Claims are proceeding piecemeal under the laws of 48 states, *id.* at 1340, and it may be as long as 40 years from the time of asbestos exposure before victims will encounter serious illness. *Id.* at 1330 (Clark, C.J., dissenting).

[161] The average plaintiff's verdict after trial was $388,000; estimates of asbestos-related deaths through the year 2015 range as high as 450,600 in the United States alone. *Id.* at 1337-38.

[162] *See Agent Orange*, 506 F. Supp. 762, 769 (E.D.N.Y. 1980), *modified*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 104 S. Ct. 1417 (1984) (government a third party defendant and primarily responsible for use of the allegedly injurious chemicals); Jackson v. Johns-Manville, 750 F.2d 1314 (plaintiff was one of thousands of shipyard employees of federal government contractors).

[163] Although the court struck the allegation of diversity because it was incomplete (the first complaint failed to include a description of the plaintiffs' domiciles) plaintiffs sufficiently reasserted diversity in their fourth amended complaint. *In re* "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928, 936 (E.D.N.Y. 1979).

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only.[164] Even so, the court's rejection of federal common law foreclosed the possibility that federal common law might provide decisional rules for *Agent Orange* under diversity.[165]

Judge Pratt certified a class action on remand[166] only one month after the circuit court reversed his earlier ruling on federal question jurisdiction.[167] The judge recognized the class management problems that *Agent Orange*'s sheer size and interjurisdictional complexity presented.[168] However, he concluded that any management device other than a class action would entail overwhelming problems.[169]

Pretrial of *Agent Orange* continued under Eastern District of New York Chief Judge Jack B. Weinstein, who was left to resolve *Agent Orange*'s choice-of-law problem.[170] The Second Circuit's ruling pro-

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[164] *Agent Orange*, 635 F.2d 987.

[165] *See supra* text accompanying notes 95-96.

[166] FED. R. CIV. P. 23(b).

[167] *Agent Orange*, 506 F. Supp. 762, 776-77, 781.

[168] *Agent Orange*, 506 F. Supp. at 791.

[169] *Id.* Judge Pratt examined the case in light of multidistrict litigation policies and determined that sufficient grounds existed to proceed. At the very least, the threshold government contract defense would be tried as a class action. *Id.* at 787.

In one sense, Judge Pratt's class certification is clearly supportable. Management of so many cases seriatim would be cumbersome and would last well into the next century. *See Agent Orange*, 100 F.R.D. at 720. Yet certification may not have met federal class action requirements. When one considers the *Agent Orange* choice-of-law issues, the problem becomes clear. Unless adjudicated under uniform substantive law, *Agent Orange* would not have met FED. R. CIV. P. 23(b)(3)(D) requirements (considering difficulties in case management). The judge seems only to have considered the statute of limitations issue in this regard. *See Agent Orange*, 506 F. Supp. at 798. Since the circuit court had rejected the use of uniform federal common law, Judge Pratt must have anticipated a manageable device for applying state law, complex as that might seem. For extended discussion of the limitations issue, see *Agent Orange*, 597 F. Supp. at 800-16. On class actions for mass tort litigation generally, see *supra* note 29.

[170] In October 1983 Judge Weinstein set trial for May 7, 1984. 597 F. Supp. at 752. Although providing for class notice in some detail, Judge Pratt had never entered his order certifying a class action. In December 1983 Judge Weinstein modified Judge Pratt's class certification, certifying one class for all issues under FED. R. CIV. P. 23(b)(3); he also ordered that notice be sent to the plaintiff class. *Agent Orange*, 100 F.R.D. 718, 720 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

In preparing for trial, Judge Weinstein reconsidered the government's motion to dismiss defendants' third party claims. *Agent Orange*, 580 F. Supp. 1242 (E.D.N.Y.), *mandamus denied*, 733 F.2d 10 (2d Cir. 1984). *See supra* note 102. Judge Weinstein reinstated the government as a third party defendant, based on direct claims by veterans' wives and children against the defendant chemical manufacturers. Agreeing with Judge Pratt's earlier ruling, Judge Weinstein dismissed third party actions against the government based on derivative claims of family members. *Agent Orange*, 580 F. Supp.

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hibited Judge Weinstein from employing the most straightforward solution — federal common law.[171] Application of different laws from dozens of states was unworkable and would have contradicted the very purpose for *Agent Orange*'s consolidation.[172]

The national consensus law theory was Chief Judge Weinstein's creative solution.[173] This approach can surmount the federal choice-of-law impasse and make reliance on uncertain applications of federal common law unnecessary.

III. Applying National Consensus Law to *Agent Orange*

A. *The Conflict of Laws*[174] *and the Solution to the* Agent Orange *Search for Applicable Law*

Class action certification in the wake of the Second Circuit's ruling against application of federal common law left the *Agent Orange* court with only one option — to apply state law.[175] Assuming that the court could apply various laws to claims from each state,[176] the first step was to identify which states' laws would govern. To determine the appropriate sources of law, Judge Weinstein used *Klaxon*[177] and *Van Du-*

1242. Third party complaints by defendants against the government for claims by veterans' wives and children are still pending, and the government was not involved in *Agent Orange's* settlement. Plaintiffs amended their complaint after tentative settlement to seek, for the first time, a remedy directly from the government. 597 F. Supp. at 754. Judge Weinstein dismissed those claims after approving settlement between the plaintiffs and the defendant chemical companies. *In re* "Agent Orange" Prod. Liab. Litig., 603 F. Supp. 239 (1985).

[171] *See Agent Orange*, 580 F. Supp. at 694.

[172] *See supra* part I B.

[173] *See infra* part III A.

[174] On the law of conflicts in general, see D. Cavers, The Choice-of-Law Process (1965); R. Cramton, D. Currie & H. Kay, Conflict of Laws, Cases-Comments-Questions (2d ed. 1975); B. Currie, Selected Essays on the Conflict of Laws (1963); R. Leflar, *supra* note 80; A. von Mehren & D. Trautman, The Law of Multistate Problems (1965); Restatement (Second) Conflicts of Law (1971); E. Scoles & P. Hay, Conflict of Laws (Lawyer's ed. 1984); Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983); von Mehren, *supra* note 2; Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 Colum. L. Rev. 946 (1981).

[175] *Agent Orange*, 580 F. Supp. at 710. *But see id.* at 697 (stating that the Second Circuit's determination that federal common law was impermissible for jurisdictional purposes was a distinct issue). *See generally supra* text accompanying notes 89-99.

[176] *See supra* part I B.

[177] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). *See supra* text accompanying notes 52-56.

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sen.[178] These cases required him to employ many states' choice-of-law methods, a formidable task.[179]

Twenty-five years ago, Judge Weinstein's conflicts analysis would have been considerably simpler. For the most part, one choice-of-law method governed multistate litigation.[180] However, the traditional lex loci delicti rule, under which the place of the wrong determines the applicable law,[181] proved unwieldy for litigation in an increasingly mobile society.[182] The complexity of modern life and problems such as determining the actual "place of the wrong" in cases like *Agent Orange*[183] prompted many states to abandon lex loci, launching the mod-

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[178] Van Dusen v. Barrack, 376 U.S. 612 (1964). *See supra* notes 57-66 and accompanying text.

[179] *See Agent Orange*, 580 F. Supp. at 699-711. Judge Weinstein applied the Restatement Second, Restatement First (lex loci), forum law, governmental interest, Leflar and von Mehren conflicts approaches. *Id.*

One commentator referred to the *Agent Orange* choice-of-law problem as an example of the inability of orthodox approaches to resolve multistate problems. *See* Juenger, *General Course*, ____ REC. DE COURS ____ (forthcoming). Others suggested that once the Second Circuit denied plaintiffs' federal common law claim, the *Agent Orange* litigation was over, susceptible only of legislative solutions. *See* Comment, *Agent Orange as a Problem of Law and Policy*, *supra* note 12, at 83; Note, In re "Agent Orange" Product Liability Litigation: *Limiting the Use of Federal Common Law as the Basis for Federal Question Jurisdiction in Private Litigation*, 48 BROOKLYN L. REV. 1027, 1051 (1982).

The Second Restatement approach required identifying significant forum contacts and examining each forum's policies supporting their substantive law for each of three substantive issues. *Agent Orange*, 580 F. Supp. at 700-06. Assuming *arguendo* that the Second Restatement method were the only United States method and that all state laws differ, this would require one court to examine policies underlying 150 laws. *Cf. In re* Air Crash Disaster at Wash., D.C. on Jan. 13, 1982, 559 F. Supp. 333 (D.D.C. 1983) (applying District of Columbia law through different choice-of-law methods to negligence, products liability, and punitive damages issues in cases from the District of Columbia, Texas, Illinois, Pennsylvania, Maryland, Massachusetts, and Virginia; applying apportionment of liability and contribution law of Florida, Texas, and Washington to those same actions; and applying District of Columbia law to all issues except apportionment of liability and contribution to actions from Georgia). Similarly complex choice-of-law problems arose in *In re* Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975). In addition, those actions also involved foreign parties and jurisdictions. *See also* Note, *The Agent Orange Litigation*, *supra* note 12, at 635 (*Agent Orange* choice-of-law analysis would be "no mean feat").

[180] That was the lex loci delicti method. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 200 (1969).

[181] BLACK'S LAW DICTIONARY 820 (5th ed. 1979); RESTATEMENT OF CONFLICTS § 377 (1935).

[182] *See infra* notes 183-84.

[183] Using lex loci in *Agent Orange* would have produced anomalous results. The

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ern "conflicts revolution."[184]

The explosion in choice-of-law methodology added to the factors judges use to determine the law applicable to each issue of a particular case.[185] Key factors in prevalent choice-of-law methods include identifying legal systems with the "most significant relationship to an occurrence"[186] and examining the policies that underlie each of those systems' applicable substantive law.[187] Other factors include which state's law yields the best results,[188] the strength of each state's interest in applying its own law,[189] and which law will best achieve harmony among the states whose interests are implicated by the dispute.[190]

Judge Weinstein surveyed the choice-of-law approaches each state court would use to identify the law applicable to each *Agent Orange* issue.[191] Analysis of *Agent Orange*'s "significant relationships" revealed

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place of the wrong might variously be considered as the place where exposure occurred (Southeast Asia), where the dioxin-contaminated defoliants were manufactured or designed, where the chemicals were mixed, where the injuries first surfaced, or in the case of genetic injuries to children, the situs of intercourse between veteran and spouse. 580 F. Supp. at 700-01, 707. Southeast Asia was the most straightforward source from which to draw substantive rules under lex loci. However, no party suggested that Southeast Asia's laws should apply. *Id.* at 707.

[184] *See* Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 379 (1966). Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), a multistate auto injury claim, signaled the end of lex loci's reign as the principal choice-of-law rule for state and federal courts and the start of the modern "conflicts revolution." Juenger, *supra* note 180, at 202-03 (noting *Babcock* but attributing the change to extensive commentary critical of lex loci). For a detailed report of later developments, see Korn, *supra* note 174.

[185] *See* W. REESE & M. ROSENBERG, *supra* note 3, at 5 ("[I]t is particularly the choice-of-law branch of conflicts that recent explosive ideas have reduced to jurisprudential rubble. . . . The changes have been volcanic."); Korn, *supra* note 174. For discussion of the need to apply each relevant state's choice-of-law approach to each individual substantive issue of a case, see *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594, 610-11 (7th Cir. 1981); *In re* Air Crash Disaster at Washington D.C. on Jan. 13, 1982, 559 F. Supp. 333, discussed *supra* note 179. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 59-60 (1973).

[186] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145, at 414 (1971).

[187] *Id.* § 6(2)(b), at 10.

[188] R. LEFLAR, *supra* note 80, § 107.

[189] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6(2)(c), at 10.

[190] *See* von Mehren, *supra* note 2, at 27.

[191] Identifying the lack of any approach or decision directly "on point . . . with the special conflicts of law issue now posed," the judge hypothesized what transferor courts considering the same conflicts issue would do. *Agent Orange*, 580 F. Supp. at 699. The judge analyzed three areas of substantive law applicable to the *Agent Orange* class action: the substantive laws of products liability, the government contract defense, and

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contacts with dozens of jurisdictions.[192] Yet Judge Weinstein's survey of the jurisdictions' choice-of-law approaches showed that every state would apply the same substantive law to each issue.[193] Each state's individual concern for injuries to residents was high.[194] Yet every state would apply a largely uniform products liability law to *Agent Orange*.[195] The government contract defense,[196] according to the choice-of-

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punitive damages. The judge found that six conflicts methods encompassed virtually all choice-of-law rules that would be used by any court in the United States. *Id.* at 699-711. The methods included the Second Restatement approach, governmental interest approach, Professor Leflar's better law, traditional First Restatement (lex loci), forum law, and Professor von Mehren's reconciling conflicts approach. *Id.* at 699.

[192] *Agent Orange*, 580 F. Supp. at 700-01. For instance, genetic injuries may have occurred anywhere plaintiffs have lived. In addition,

> The original exposure . . . was at a variety of places in and near Vietnam — i.e., South Vietnam, Cambodia and Laos. The conduct causing the injury was the manufacture of Agent Orange by the defendants and the alleged failure by the defendants to warn the government of the dangers of Agent Orange. Agent Orange was manufactured in factories in New Jersey, Michigan, Arkansas, West Virginia, Missouri and Canada, and perhaps Germany and elsewhere. The basic decision to use it was made in and around Washington, D.C. and in South Vietnam . . . . The companies responsible for its manufacture are incorporated and have as their main place of business the states of Delaware, New Jersey, Ohio, Michigan, Missouri, Kansas and Connecticut . . . . It is difficult to pinpoint any particular states as the location of the failure to warn since what is alleged is inaction, not action.

Id. at 700.

[193] Judge Weinstein found that each approach supported application of a national law to *Agent Orange*'s three principal substantive issues. *Id.* at 699-711. "Any narrow and mechanical state choice of law system simply collapses under the weight of the multiplicity of contacts, policies and unarticulated or conflicting state interests in this unique case." *Id.* at 703. For instance, while the lex loci approach identified South Vietnamese or Cambodian law, Judge Weinstein noted,

> South Vietnam . . . no longer exists and Cambodia appears to be an independent state in name only now taken over by Vietnam. North Vietnam, the jurisdiction that has replaced South Vietnam and Cambodia, was at war with the United States and it was in the prosecution of the war that the exposure to Agent Orange took place. It would be ludicrous to allow North Vietnam . . . to determine the law of this case.

Id. at 707. The judge asserted that in this instance, states still following lex loci would turn to federal law. *Id.* at 707-08.

[194] *See, e.g.*, *Agent Orange*, 580 F. Supp. at 697 (listing state legislation on behalf of Agent Orange victims).

[195] *Id.* at 701 *passim*. Judge Weinstein expressed the policy underlying the substantive law of products liability by quoting Justice Roger Traynor's opinion in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) ("The purpose of such liability is to ensure that the costs of injuries result-

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law analyses, was a national issue.[197] The states' overriding concern about the government contract defense would lead them to apply a single law to all *Agent Orange* claims. That law necessarily would reflect the serious state and federal interests in national security.[198] Judge Weinstein held that every court nationwide would concur: when the applicable substantive law was not yet nationally uniform, *Agent Orange*'s overwhelmingly federal character would compel state judges to make new uniform law.[199]

Although unorthodox, Judge Weinstein's opinion was the only feasible solution to two problems. The first was *Agent Orange*'s choice-of-law puzzle. Consensus among state courts to apply national rules

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ing from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.") *Agent Orange*, 580 F. Supp. at 701. *But see* Note, *The Agent Orange Litigation*, *supra* note 12, at 693-94 (arguing that because substantial variations exist among state products liability laws, federal common law should have applied).

[196] The government contract defense to products liability claims protects government suppliers when the government itself would be immune from suit over the same injuries. General requirements include: (1) the United States must be immune from liability; (2) the United States must have established or approved specifications for the defective item; (3) the item must have conformed to specifications; and (4) the contractor must have warned the United States of the dangers of using the item. Comment, *Strict Product Liability Suits for Design Defects in Military Products: All the King's Men; All the King's Privileges?*, 10 U. DAYTON L. REV. 117, 117-18, 129 (1984). On the government contract defense generally, and in *Agent Orange*, see *Agent Orange: Government Responsibility for the Military Use of Phenoxy Herbicides*, 3 J. LEGAL MED. 137 (1982); Blechman, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489 (1982); Hanes, *supra* note 12; Rivkin, *The Government Contract Defense: A Proposal for the Expeditious Resolution of Asbestos Litigation*, 17 FORUM 1225 (1982) (written by lead counsel for *Agent Orange* defendants); Comment, *Expansion of the* Feres *Doctrine*, 32 EMORY L.J. 237 (1983). Note, *Strict Liability and the Military Plaintiff*, 22 HASTINGS L.J. 400 (1971).

[197] The judge concluded that all state courts would recognize the paramount national interest in liability of government contractors. *Agent Orange*, 580 F. Supp. at 701-05. He then buttressed his conclusion by referring to the obverse issue, compensation for veterans. Judge Weinstein suggested that any state judge facing the conflicts question would recognize both irrationality and inequity in applying anything but "a federal or a national consensus law," *id.* at 713, to "legally identical claims involving servicemen who fought . . . shoulder-to-shoulder and were exposed to virtually identical risks . . . . [I]t makes 'little sense for . . . liability to members of the Armed Services (to be) dependent on the fortuity of where the soldier happened to be stationed at the time of his injury.' " *Id.* at 703 (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977)).

[198] *Agent Orange*, 580 F. Supp. at 705.

[199] *Id.* at 709-11.

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would eliminate the impossible and inequitable task of simultaneously applying dozens of states' laws.[200] Consequently, the consolidated actions were ready to proceed in one court, and settlement soon followed.[201] The second problem was how to handle a growing number of complex multistate tort cases in federal courts without invoking federal common law.[202] Judge Weinstein's acknowledgment of national legal homogeneity can apply to many of these cases. In fact, national consensus law's potential significance eclipses national concern over the legal fate of the *Agent Orange* litigation itself.

B. The Foundation for Chief Judge Weinstein's National Consensus Law

National consensus law rests on the general proposition that state courts confronting similar legal issues will use the same law to resolve those issues. In the context of *Agent Orange* and the federalist judicial system, Judge Weinstein based national consensus law on several factors.

First, the size and complexity of the multistate *Agent Orange* litigation made uniform national rules of decision necessary. The claims were novel and merited consolidation in one court.[203] In prior cases

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[200] However, the court asked the parties to brief applicable state statutes of limitations. The court distinguished this issue as posing "special choice of law problems." *Id.* at 713. *See generally Agent Orange*, 597 F. Supp. at 800-16 (later discussion on applicable statutes of limitations).

[201] The parties reached a tentative accord three months after Judge Weinstein's conflicts decision. *See Veterans Accept $180 Million Pact on Agent Orange*, NY Times, May 8, 1984, § 1, at 1, col. 5 (Judge Weinstein named three special masters to facilitate contacts between the parties; settlement apparently was worked out at 4 a.m. the morning jury selection was to begin).

Having determined that a viable plan for distributing the settlement assets could be formulated, the court approved settlement on January 7, 1985. The court modified its order on June 18, 1985, *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1301 (E.D.N.Y. 1985) (Memorandum and Order on Attorney Fees as Modified and Final Judgment), and required attorneys to file all discovery materials with the court for present or future use. *Id.*

[202] One example is the asbestos litigation. *See supra* text accompanying notes 156-62. Judge Weinstein is not alone in suggesting that uniform law can solve multistate litigation problems. *See, e.g.*, von Mehren, *supra* note 2, at 42:

> [O]ne who expects to achieve results in multistate cases that are as satisfying in terms of standards of justice and of party acceptability as those reached in purely domestic cases is doomed to disappointment. Perhaps the most satisfactory solution would be to render choice of law unnecessary by establishing supra-national rules . . . .

[203] The case's novel aspects included the prolonged but uneven exposure of veterans

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similar to *Agent Orange*, courts have employed federal common law. These cases include consolidated air crash litigation,[204] disputes surrounding military activities in Vietnam,[205] and suits for injuries to military personnel inflicted by third parties.[206] *Agent Orange*'s tremendous size, complexity, and importance made the need for uniform rules at least as compelling as in these other cases.[207] Since the Second Circuit foreclosed the federal common law route to uniform rules,[208] national consensus law was the only way to resolve the case.

The historical trend of legal centripetalism is the second basis for Judge Weinstein's national consensus law.[209] The burgeoning develop-

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to Agent Orange, the plaintiff class' sheer size, and the probable long delay before genetic and carcinogenic injuries surfaced. In addition, some plaintiff class members based causes of action on being "at risk" to an elevated probability of developing cancer and genetic injuries. Although this problem is relatively new for the courts, it surely will arise in many future cases. *See supra* text accompanying notes 155-62. Despite dozens of studies and hundreds of thousands of pages of scientific literature addressing the causation problem, the court noted that "the factual issues [are] unresolved by the scientific communities addressing them." *Agent Orange*, 597 F. Supp. at 746. *See id.* at 77 *passim. See also* 580 F. Supp. at 697 (widespread state legislative expressions evidencing the Agent Orange problem's special nature).

[204] *See In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975) (Hall, J.) (in 203 suits from 24 foreign countries and 12 states presiding judge applied federal common law, finding that California punitive damages law would serve dominant federal interest, since no state's law differed substantially from California's). *See also* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (applying federal common law to air crash litigation).

[205] *In re* Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975, 476 F. Supp. 521 (D.D.C. 1979) (in action that arose from crash of American-built C-5A transport used by Air Force to move orphans near end of Vietnam war, court adopted District of Columbia law of survival as federal common law because of paramount federal interest and case's sui generis nature).

[206] United States v. Standard Oil Co., 332 U.S. 301 (1947) (in government suit to recover costs of third party injury to soldier, federal interest in uniformity merited application of federal common law).

[207] Moreover, while adopting a single state's law may have been appropriate in *Paris Air Crash*, 399 F. Supp. 732, and in *Air Crash Disaster Near Saigon*, 476 F. Supp. 521 (both discussed *supra* notes 204-05), it was not appropriate in *Agent Orange*. Most states had never considered the government contract defense. *See supra* part III A.

[208] *Agent Orange*, 635 F.2d 987.

[209] Judge Weinstein noted,

> While those close to the American law scene tend to emphasize the diversity of substantive law among the states and between the states and the federal government, to outside observers much of the differences must appear as significant as that among the Lilliputians to Swift's hero. Faced with a unique problem, American lawmakers and judges tend to react in

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ment of American law creates an ever stronger pull toward uniform solutions.[210] Institutionalized bodies that establish policy, including the American Law Institute, strongly influence courts throughout the nation.[211] The American case method, which draws on precedent from states throughout the country to teach substantive law principles, reinforces the trend toward legal homogeneity.[212]

Commentators noted this centripetal tendency in the late 1930's. Predicting that *Erie* would change judicial method more than it would the outcome of particular cases,[213] eminent jurists and scholars, including Judge Friendly,[214] Judge Clark,[215] and Professor Corbin,[216] underscored the homogeneity of American law. Even cases that refined the *Erie* doctrine attest to American law's essential uniformity; after hearing the *Klaxon* case on remand, the Third Circuit concluded that the law of Delaware, the forum state, was the same as the law of New

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much the same way, arriving at much the same result.

Agent Orange, 580 F. Supp. at 696. *Accord* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY §§ 381-83, at 386-88 (2d ed. 1978) ("there is a fundamental unity of the Common law in the United States").

[210] *Agent Orange*, 580 F. Supp. at 696. *See supra* note 209.

[211] *See Agent Orange*, 580 F. Supp. at 696 (noting also the Restatements, the work of the National Conference of Commissioners on Uniform State Laws, and the uniform charters of the National Municipal League). The National Conference of Commissioners has drafted over 200 uniform acts. UNIFORM LAWS ANNOTATED, Cross Reference Index to Acts 1-7 (Master ed. 1985). Almost all states have adopted 30 or more of these acts. *Id.* at 8-63.

[212] R. DAVID & J. BRIERLEY, *supra* note 209, § 382, at 387. The Supreme Court's effort to lighten the federal caseload by discouraging case by case lawmaking also reinforces the centripetal effect. The Court favors certain, easily applied, and uniform laws. *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983) (outlining presumption applicable to question of adequate and independent state grounds for efficient appeals).

[213] For instance, Judge Clark noted in 1946 that "the views of state judges . . . have been largely influenced by important federal decisions. . . . Except for some slight nuances of emphasis, this law may well be much the same, whether expounded by state or federal judges . . . ." Clark, *supra* note 1, at 283 (discussing issue of whether there should be an integrated or local law to govern cases of unfair competition). He added, "federal judges [should] be allowed to resume their functions in exercising the judicial process, as I hope to demonstrate later, and not be restricted to the role of 'ventriloquist's dummy' as to state law . . . ." *Id.* at 282-84 (quoting Judge Frank in Richardson v. Commissioner of Internal Revenue, 126 F.2d 562, 567 (2d Cir. 1942) (footnote omitted)).

[214] Friendly, *supra* note 23.

[215] Clark, *supra* note 1, at 283-84; *see also infra* note 220.

[216] Corbin, *The Common Law of the United States*, 47 YALE L.J. 1351 (1938) (predicting negligible impact of *Erie*).

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York, where the events that led to the litigation occurred.[217]

Finally, state courts would have the power to apply uniform national rules regardless of the Second Circuit's earlier denial of federal common law.[218] Judge Weinstein performed his *Erie*-mandated task of following the conflicts approaches that each state court would employ.[219] Like Second Circuit Chief Judge Feinberg, Judge Weinstein concluded that barring federal remedies for such patently national litigation was anomalous.[220] Since *Erie* requires judges to second-guess state courts,

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[217] Stentor Elec. Mfg. Co. v. Klaxon Co., 125 F.2d 820 (3d Cir.), *cert. denied*, 316 U.S. 685 (1942).

[218] A state court could choose adoption of federal substantive law to deal with novel questions regardless of *Erie* (which was a decision binding only federal courts). *See Erie*, 304 U.S. 64; Westen & Lehman, *supra* note 23, at 338-39. Interestingly, commentators have noted the Second Circuit's reluctance to permit federal common law application. Perhaps this results from the large volume of federal common law cases that the Second Circuit has handled in the securities area. The Supreme Court is increasingly reluctant to handle federal common law securities actions. *See generally* Brown, *supra* note 23, at 635. *Cf.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982) (Stevens, J.) (stating that the narrow modern approach is in part due to concern over the growing federal caseload). *Contra* Brown, *supra*, at 635-36 (claiming the reason for restrictiveness is doctrinal).

[219] *Agent Orange*, 580 F. Supp. 690 *passim*. On first view, Judge Weinstein's task may appear like that of pre-*Erie* judges, seeking to divine the general federal common law. However, instead of reviving a transcendent federal common law, the judge's analysis showed that all states independently would choose uniform national rules for *Agent Orange*. 580 F. Supp. at 699-713. *See supra* text accompanying notes 191-99. As others have pointed out, "There is no such thing as valid *general* federal law, because the federal government is one of limited . . . powers." Westen & Lehman, *supra* note 23, at 338 (emphasis in original). Accordingly, valid general federal common law cannot exist, because courts acting in a common law capacity possess only as much power as the legislature. *Id.* Westen & Lehman note that in fashioning federal law, federal courts may: "1) declare independent federal common law, provided they confine their lawmaking to areas permissible for legislation by Congress; or, 2) declare general common law, provided they do so on behalf of, and in the name of, the states which do possess general lawmaking authority." Westen & Lehman, *supra*, at 338-39. Barred by the Second Circuit from the first option, Judge Weinstein simply announced that he intended to use the latter route. *Agent Orange*, 580 F. Supp. 690.

For discussion of the general federal common law of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), see *supra* note 23. In his 1938 article, Professor Corbin described the general federal common law as "the roc-like bird whose wings have been believed to overspread forty-eight states," Corbin, *supra* note 216, at 1353. Professor Corbin used this metaphor to contrast Justice Holmes' famous "brooding omnipresence" passage in Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting), which emphasized that the federal common law was not general, but instead specific to individual states, thus varying in content from one state to the next.

[220] Judge Weinstein claimed to be only a mouthpiece for state and federal courts throughout the country. *See* 580 F. Supp. at 692-93. Criticism of the Second Circuit's

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Judge Weinstein determined that state courts would reach the simplest, most expedient solution.[221] Every state would apply the same set of rules: national consensus law.[222]

C. Using National Consensus Law in Multistate Litigation

National consensus law is a new tool available to federal judges to avoid erratic, unjust results.[223] Judges making federal common law

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ruling that no substantial federal interest existed supports Judge Weinstein's hypothesis. *See* sources cited *supra* note 150. As Judge Clark noted in 1946,

> [Application of *Erie*] can be easily pressed to the point of unreality, indeed of inequity in complicated affairs of modern life.
>
> . . . .
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> . . . [A]fter all, we are one country and a united country; and our law must and will develop to fit our national needs. True, we are a union of states; and it is proper and fitting that we give scope to state law upon matters of local interest and value which do not conflict with national needs or ideals. But when such conflict occurs, no judicial generality or abstraction [such as the *Erie* doctrine] will, or should, reject that national demand. . . .

Clark, *supra* note 1, at 280, 296. *See also supra* text accompanying note 145.

[221] It is entirely reasonable to assume that the state courts would recognize the strong national interest in a uniform national rule. . . . [W]hat would state courts do? Would they not look to the first court that dealt with the issue or to a neutral body to formulate the uniform rules they could all accept for this unique litigation? And is not a federal court charged with adjudicating all or nearly all the *Agent Orange* cases such a body?

Agent Orange, 580 F. Supp. at 710-11.

[222] *Id.* at 711.

[223] National consensus law enabled the *Agent Orange* litigation to proceed in one forum. With no single source of law, the class action manageability requirement would have compelled separate trials under each state's different rules. *See Agent Orange*, 100 F.R.D. 718, 724. The court would have needed to remand the individual suits to transferor courts once pretrial was complete. *See* MANUAL FOR COMPLEX LITIGATION § 1.43, at 37-40; § 5.22, at 167-68 (1982). District courts probably would have reached disparate results for plaintiffs from each state. *See, e.g.*, *supra* note 29; *supra* text accompanying notes 155-62. In addition to gross duplication and waste of judicial resources, the government indemnification problem would have lingered for many years.

Commentators and judges have long recognized the need for federal courts to resolve difficult problems that were federal in nature but did not fall directly under federal statutes. In his popular 1957 article, Mishkin framed the issue and its resolution in the following way:

> At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. *In other words, it must mean recognition of federal judicial competence to*

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now face increasingly restrictive and unreliable precedents.[224] National consensus law avoids the modern *Erie* restrictions on federal common law.[225] Instead, the approach employs *Erie*, enabling federal judges to follow nationwide legal trends the way state judges do.

The national consensus law approach accommodates federalism concerns and, at the same time, addresses the legal needs of a largely homogeneous society.[226] On a theoretical level, national consensus law is not an attempt to delineate another enclave of federal judge-made law. Rather, the approach incorporates *Erie*'s progeny into a framework that supports the law's continuing development. Moreover, national consensus law advances *Erie*'s twin policies.[227] It ensures intrastate uniformity of result by using *Klaxon* and *Van Dusen* to identify the governing law. Additionally, while *Erie*, *Klaxon*, and *Van Dusen* addressed only forum shopping between state and federal courts within single states,[228] national consensus law actualizes anti-forum shopping policies nationwide.[229]

> *declare the governing law* in an area comprising issues substantially related to an established program of government operation.

Mishkin, *supra* note 23, at 800 (footnote omitted) (emphasis added). Some judges expressed the need more adamantly. *See, e.g.*, Clark, *supra* note 1, at 290-95.

[224] *See supra* note 151; *supra* text accompanying notes 155-62.

[225] *See supra* part II B.

[226] Pondering the relationship of state and federal courts almost 25 years after *Erie*, Judge Friendly described his vision of courts tailored to modern federalism, as United States society grew more homogeneous.

> The complementary concepts — that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed — seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made. We may not yet have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of *Erie* with *Clearfield* and *Lincoln Mills* has brought us to a far, far better one than we have ever known before. . . .

Friendly, *supra* note 23, at 422.

Twenty five years after Judge Friendly's famous commentary, as we near *Erie*'s 50th anniversary, the *Erie* doctrine still hinders federal judicial competence. For the large part, judges seem only to view *Erie* as a limitation.

[227] *See supra* text accompanying notes 50-51.

[228] *See supra* part I A.

[229] National consensus law accomplishes this by ensuring nationwide uniformity of results. The need for such a refinement in *Erie* has been apparent for some time. *See* David, *supra* note 76, § 27 (*Van Dusen*'s inequity among states is "scandalous");

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Given the derivative state law analysis that *Klaxon* and *Van Dusen* demand of federal judges,[230] national consensus law also creates none of the federal common law problems that preoccupy the Supreme Court.[231] The unitary national consensus law applies only when state courts presumably would identify a paramount need for national uniformity, when relevant state laws are already substantially uniform, or when cases present problems that state courts have not yet considered but for which nonbinding federal case law offers the most attractive solution.[232] For those who believe the *Erie* doctrine is constitutionally mandated, following the doctrine assures national consensus law's constitutionality.[233] Owing to its derivative character, national consensus law should be no more unpredictable than the *Erie* doctrine itself.[234] If federal interest in uniformity is the touchstone for federal common law, the touchstone for national consensus law is the states' interest in uniformity.[235]

National consensus law provides uniform law for complex multistate litigation.[236] Until the Supreme Court formulates more reliable and

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Wright, *supra* note 23, at 326-28 (criticizing *Erie*'s inability to achieve both statewide and nationwide uniformity).

[230] *See supra* part I A.

[231] Among others, these include *Erie*'s twin policies and concern for a growing federal caseload. *See supra* text accompanying notes 50-51; *supra* note 219.

[232] *See supra* parts III A-B. State courts may follow federal case law as persuasive authority for novel problems if they so choose. However, if federal common law governs the subject, state courts must follow federal precedent. *See supra* note 36.

[233] While the Supreme Court could not reverse Judge Weinstein's theoretical approach, they may disagree with his factual hypothesis that state courts would look to federal or national law to resolve *Agent Orange*. *See supra* notes 23 & 51, and sources cited therein regarding *Erie*'s constitutional basis.

[234] Discussing the margin of error and consequent unpredictability that the national consensus law approach creates, the *Agent Orange* court noted,

> It is, however, common to find state courts and federal courts sitting as state courts under *Erie*. . . .
>
> . . . Perhaps it would have been better if certification rules permitted posing the conflicts question to the more than half-a-hundred jurisdictions involved . . . . In the meantime, this court must [as is daily the case for all federal district courts] ascertain the living state law as best it can.

580 F. Supp. at 713. *Cf.* Wright, *supra* note 23 (discussing *Erie*'s unpredictability and criticizing the tremendous expenditure of judicial resources that *Erie*'s second guessing of state judges requires).

[235] Most importantly, the absence of federal interest in uniformity does not preclude the interest of states in national uniformity. *See supra* text accompanying notes 191-99.

[236] State courts already use a form of national consensus law — common law influenced by national legal institutions. *See supra* text accompanying notes 209-22. Federal courts need to refer to the common law that state courts would identify in cases impli-

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flexible guidelines for federal common law, the derivative national consensus law may be the only way to make uniform law and to resolve many complex multistate cases equitably.[237]

CONCLUSION

Federal courts need ways to resolve a growing number of legal disputes that result from modern, geographically complex transactions.[238] The Supreme Court's decisions undermining the reliability and usefulness of federal common law have forced judges to seek new sources of law to govern today's litigation. For the present, adopting the state court perspective will enable federal courts to avoid chaos, while at the same time escaping reversal for exercising excessive federal power. To accommodate growing mobility and legal complexity, state courts created the "conflicts revolution."[239] Those same pressures are pushing state courts to give birth to a substantive law of national consensus. Within constitutional limits, and in accordance with the *Erie* mandate, the federal judiciary must follow suit and shoulder its share of the burden as best it can.

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cating national interests. *See supra* text accompanying notes 156-62.

[237] *See supra* note 155; *supra* text accompanying notes 156-62.

[238] Congress cannot provide rules for each problem facing the federal courts. *See, e.g.*, D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 470 (1942) (Jackson, J., concurring): "Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the constitution itself."

[239] *See supra* notes 183-90 and accompanying text.

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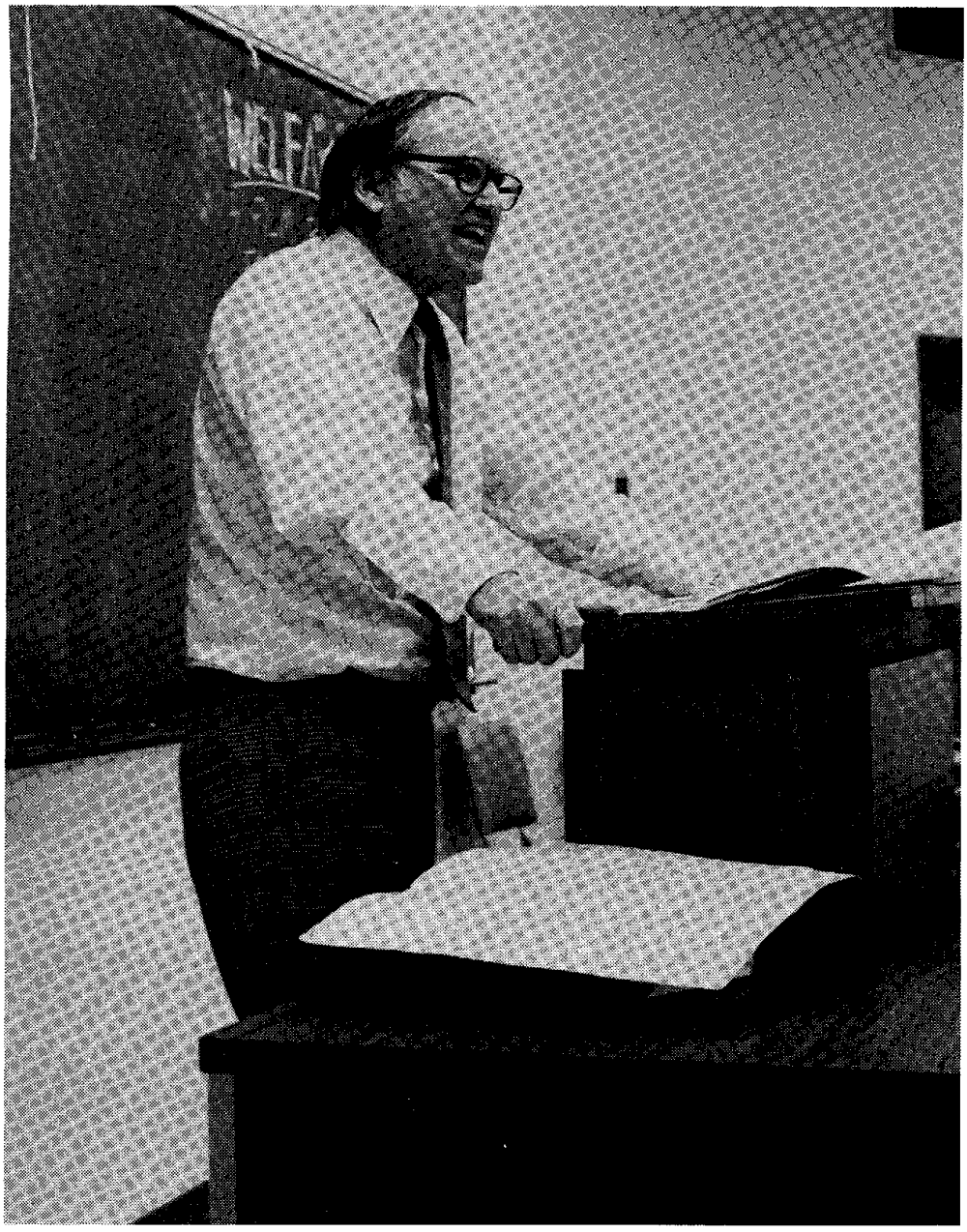

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