

FEDERAL JUDICIAL LAW-MAKING POWER: COMPETENCE AS A FUNCTION OF COGNIZABLE FEDERAL INTERESTS

INTRODUCTION

Our system of federalism, which distributes legislative power between national and state governments, requires that the limits of institutional power be carefully defined and scrupulously observed.¹ Ascertaining the limits of law-making power is of particular importance with respect to the federal courts, since federal courts may in some cases have the jurisdictional power to entertain certain cases while lacking the law-making power to choose the rule of decision.² That federal judicial law-making is, in fact, *constitutionally* circumscribed was made clear in *Erie Railroad v. Tompkins*.³ In *Erie*, the Supreme Court held that the application of federal common law to a case arising under state law and litigated in a federal court on the basis of diversity jurisdiction is an unconstitutional assumption of power.⁴ This declaration of unconstitutionality has been understood as recognizing two general limits on the law-making power, or competence, of the federal courts.⁵ First, the law-making power of the federal courts cannot exceed the constitutionally authorized powers of the Congress.⁶ Thus, where Congress lacks authority to legislate, the federal courts similarly lack competence to *judicially* legislate. Second, even in areas where Congress may properly act, the federal courts lack law-making power unless Congress *has* acted so as to supplant state law in that area.⁷ These limitations on the competence of the federal courts recognize enclaves of state substantive law constitutionally protected from incursions by unauthorized federal judicial law-making.

The issue of competence addressed in *Erie* may be framed as a question of whether the federal courts are free to choose between federal or state law as the rule of decision in a particular case, or whether they are obligated to apply state law. Extrapolating from the

¹ See A.T. Von Mehren & D.T. Trautman, *The Law of Multistate Problems*, 1049-59 (1965).

² *United States v. Little Lake Misere Land Co., Inc.* 412 U.S. 580, 591 (1973); *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

³ 304 U.S. 64 (1938).

⁴ 304 U.S. at 77-78. See, e.g., *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975); *Marx & Co., Inc. v. Diner's Club, Inc.*, 405 F. Supp. 1, 3 (S.D.N.Y. 1975); *Sargent v. Genesco, Inc.*, 337 F. Supp. 1244, 1248 (M.D. Fla. 1972). See also 1A Moore, *Federal Practice* ¶ 0.305[3] at 3052-53 (2d ed. 1974); Note, *The Competence of the Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1087 (1964).

⁵ See Mishkin, *Some Further Last Words on Erie - The Thread*, 87 HARV. L. REV. 1682 (1974) (hereinafter cited as Mishkin, *The Thread*); Hill, *The Erie Doctrine and the Constitution*, 53 N.W.U.L. Rev. 427 (1958); 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, 798-802 (1957) (hereinafter cited as Mishkin, *Federal Law*).

⁶ Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702-04 (1974); Hill, *supra* note 5, at 442.

⁷ Hill, *supra* note 5, at 441-45; Mishkin, *The Thread*, *supra* note 5, at 1683.

holding in *Erie*, which, on the facts denied federal judicial law-making power where the case was in federal court as a result of the diversity of citizenship of the parties, federal courts have generally applied the test that the competence of the courts to choose the applicable law is a function of the source of the right sued upon.⁸ According to this test, where the source of the right sued upon is state law, the federal courts lack competence to choose the rule of decision.⁹ In those cases, as in *Erie*, state law would apply of its own force.¹⁰ Conversely, where federal law provides the underlying right, federal courts have found themselves competent to choose the applicable rule.¹¹ In the exercise of that choice, federal courts may choose to apply relevant state law or they may choose to develop federal common law.¹² *Erie* and its progeny¹³ warrant the conclusion—that where the source of the right sued upon is state substantive law, the federal courts lack competence and must apply state law. But the rule of *Erie* does not necessarily exhaust the limitations on the power of the federal courts. Despite its frequent invocation,¹⁴ the proposition that where the source of the right is federal law, federal courts are competent to resolve all issues affecting that right is not a necessary corollary of *Erie*.

This comment will consider the law-making power of the federal courts where the right sued upon is provided by federal law and will suggest that even though a party may sue on a right created by federal law, certain issues affecting this federal right may in fact, be outside the competence of the federal courts where they do not implicate any cognizable federal interest. A recent case decided by the United States Court of Appeals for the Third Circuit, *Three Rivers Motors Co. v. Ford Motor Co.*,¹⁵ will be analyzed to examine the often-held assumption that unless a case in federal court is controlled by *Erie*, there are no limits on the power of the federal courts to determine the rule of decision. Following consideration of the court's opinion in *Three*

⁸ *Colton v. Swain*, 527 F.2d 296, 300 (7th Cir. 1975); *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975); *Donegal Steel Founding Co. v. Accurate Products Co.*, 516 F.2d 583, 587 n.6 (8th Cir. 1975); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540-51 n.1 (2d Cir. 1956). But see *Dura Elec. Lamp Co. v. Westinghouse Elec. Corp.*, 249 F.2d 5, 6 (3rd Cir. 1957); *Momand v. Twentieth Century Fox Film Corp.*, 37 F. Supp. 649, 655 (W.D. Okla. 1941). See Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1087 (1964).

⁹ See *Wichita Royalty Co. v. City Nat. Bank*, 306 U.S. 103, 107 (1939); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹⁰ See, e.g., *Colton v. Swain*, 527 F.2d 296, 300 (7th Cir. 1975); *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975).

¹¹ E.g., *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 14 (4th Cir. 1971); *Hill v. Whitlock Oil Services, Inc.*, 450 F.2d 170, 173 (10th Cir. 1971).

¹² See *Mishkin, Federal Law*, *supra* note 5 at 802.

¹³ The *Erie* doctrine received elaboration in, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Corp.*, 356 U.S. 525 (1958); and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

¹⁴ See cases cited at note 11 *supra*.

¹⁵ 522 F.2d 885 (3d Cir. 1975).

FEDERAL JUDICIAL LAW-MAKING POWER

Rivers, the principles of federalism underlying the decision in *Erie* will be abstracted as a means of identifying limits on the law-making power of the federal courts. Next, cases will be considered in which state law seems to have applied its own force, even though *Erie* was inapplicable. Finally, *Three Rivers* will be re-examined in light of the perspective on the limits of the competence of the federal courts yielded by these cases.

I. THE THREE RIVERS CASE

Three Rivers Motors Co. v. Ford Motor Co. presented the question whether federal or state law would determine the scope of a release interposed as a bar to a private antitrust action.¹⁶ Three Rivers had operated an automobile dealership under a Ford franchise agreement.¹⁷ Due to operating losses presumed to have resulted in part from competition with another Ford-owned dealership in the same area, Three Rivers sought to resign the franchise.¹⁸ Under the original franchise agreement, Ford had the option but not the obligation to repurchase Three Rivers' inventory.¹⁹ Ford had unilaterally altered the agreement, however, by obligating itself to repurchase the inventory in exchange for the dealer's execution of a general release.²⁰ Three years after the execution of the release, Three Rivers filed an antitrust action alleging, *inter alia*, a price fixing arrangement between Ford and the competing Ford owned dealership.²¹

The district court held that, as a matter of federal common law, the release did not bar the claim, since there was no intention on the part of Three Rivers to release the antitrust cause of action.²² On ap-

¹⁶ *Id.* at 888. The claim was brought under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970).

¹⁷ 522 F.2d at 887.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 888.

²² *Three Rivers Motors Co. v. Ford Motor Co.*, 374 F. Supp. 620, 629 (W.D. Pa. 1974). In determining whether to apply federal common law, the district court began with the proposition that federal policy mandates heavy reliance on private enforcement of the antitrust laws. *Id.* at 624. The court then suggested that in light of this policy "federal law should wholly displace State law governing the release of antitrust claims." *Id.* In support of this position the court extensively quoted *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343-48 (1971), which applied federal common law to determine the effect of releases on joint tortfeasors. *Three Rivers Motors Co. v. Ford Motor Co.*, *supra*, at 624-26. Next, the district court in *Three Rivers* extensively quoted *Novak v. General Elec. Corp.*, 282 F. Supp. 1010, 1013-14, 1016 (E.D. Pa. 1967), in which the court developed the wholly different proposition that state law should apply as a matter of federal choice. *Three Rivers Motors Corp. v. Ford Motor Co.*, *supra*, at 626-27. Finding that the state law was allowed and supported by antitrust policy, the *Novak* court applied the state rule that the effect of the release is to be determined by the intent of the parties. *Novak v. General Elec. Corp.*, *supra*, at 1019, 1023. These two approaches seem incompatible, unless a case presents the happy coincidence in which a particular state rule exactly parallels the only appropriate federal

peal, the Third Circuit confronted the threshold issue of the power of the federal courts to choose the applicable rule. It concluded, as had the district court,²³ that the holding of *Erie* and its progeny did not apply, since the source of the right affected by the release was a federal statutory program.²⁴ The Third Circuit apparently assumed that since *Erie* did not deny the court authority to fashion the controlling law there was no further need to examine the competence of the court with respect to specific issues; thus, on resolving the specific issue of the release the court determined that it could choose either federal or state law.²⁵ In making that choice, the court weighed the respective state and federal interests in the release. Three factors were considered determinative of whether state or federal law would apply: the need for a uniform rule, the extent to which the transaction under review is normally defined and guided by state law, and the possibility that the application of the state rule would frustrate the national policies implicit in the federal antitrust legislation.²⁶

Analyzing these factors, the court first concluded that there was no need for a uniform rule regarding the construction of releases.²⁷ The court reasoned that since the parties could achieve their ultimate purposes by merely tailoring their agreements to the applicable requirements there would be no practical difference whether there was a single federal rule or separate state rules.²⁸ Second, the court concluded that "[s]tate law customarily governs the field of contracts and it is to state rather than federal law that private parties are likely to refer when formulating the terms of a contractual release."²⁹ Finally, no conflict was discerned between the state rule for the interpretation

rule. On one hand, if the overriding concern is maintenance of a "uniform federal rule," reliance on *Novak* is misplaced. The reasoning in *Novak* attempts to justify the choice of state law where the state rule does not conflict with federal policy. Presumably, under *Novak*, use of state law would be appropriate in any state in which the issue arose. Thus, another federal court in a different circuit could, following *Novak*, choose to adopt the rule of a different state as the "uniform federal," rule resulting in a surfeit of "uniform rules." On the other hand, if the rule articulated in *Zenith* controls, and federal law wholly displaces state law on the issue of release of antitrust claims, then a *Novak*-type examination of state law is wholly superfluous. The district court in *Three Rivers*, however, mixed these incompatible approaches to decide that as a matter of "uniform federal law," the intent of the parties to a release determines the effect of the release. See *Three Rivers Motors Co. v. Ford Motor Co.*, *supra*, at 629.

The ease with which the district court moved from an assertion of general federal policy to the development of federal common law is an indication of the need for more rigorous attention to the threshold issue of competence, in order to avoid unjustifiable expansion of federal judicial power.

²³ *Three Rivers Motors Co. v. Ford Motor Co.*, 374 F. Supp. 620, 626 (W.D. Pa. 1974), *citing* *Novak v. General Elec. Corp.*, 282 F. Supp. 1010, 1013 (E.D. Pa. 1967).

²⁴ 522 F.2d at 888-89.

²⁵ *Id.* at 889.

²⁶ *Id.* at 889-90.

²⁷ *Id.* at 890.

²⁸ *Id.*

²⁹ *Id.* at 891.

FEDERAL JUDICIAL LAW-MAKING POWER

of release and federal antitrust objectives.³⁰ As a result of these conclusions, the appellate court chose to apply state law, as opposed to federal law, in order to define the effect of the release.³¹ Under the state rule of construction, the release was deemed a general settlement of accounts, thereby barring Three Rivers' claim against Ford Motor Co.³²

It is noteworthy that no federal interest was identified by the Third Circuit. In fact, both the court's argument against a uniform federal rule and its conclusion that no conflict between the state rule and federal policies exists seem persuasive only insofar as they reflect an implicit finding that there are no cognizable federal interests in releases of antitrust claims.

With respect to the issue of a uniform rule, it is apparent that were there substantive federal interests in releases of antitrust claims, a formal federal rule could certainly have been fashioned to promote those interests. For example, if federal antitrust policy mandated special efforts to preserve private antitrust claims, the court might have considered a rule that would preserve antitrust claims until they were explicitly released.³³ Or, the court might have assigned to the released party the burden of proof on issues of intent or adequacy of consideration.³⁴ In either case the rules would not function as formal requirements to which the parties must adjust. Rather, such rules would establish presumptions in favor of avoiding arguably unfair or inadvertent settlements. The court's choice of state law is defensible, therefore, not because a uniform federal rule could not make a difference as the court argued,³⁵ but because there is no statutory basis which mandates such a difference.

Similarly, the absence of any federal interest in releases of antitrust claims may be inferred from the court's conclusion that the state law was compatible with federal policy. Certainly, the state rule which served to bar the antitrust claim was not adopted affirmatively to enhance any federal policy. Rather, the state rule seemed acceptable simply because there was no federal policy with which it was in direct conflict. While the Third Circuit did not directly address the issue of the existence of federal interests, the arguments advanced by the court in support of the choice of state law necessarily lend support to the position that no special federal interest in releases of antitrust claims exists.³⁶

The analytic structure applied by the Third Circuit in *Three Rivers* involved a threshold determination that the court had competence to choose the rule of decision, followed by a weighing of state and

³⁰ *Id.* at 892.

³¹ *Id.*

³² *Id.* at 897.

³³ *Cf.* *Dice v. Akron, C & Y R.R.*, 342 U.S. 359 (1952).

³⁴ *Cf.* *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940).

³⁵ *Id.* at 890-91.

³⁶ *See id.* at 891.

federal interests in order to make that choice.³⁷ Certain aspects of federalism are manifested by this process. In particular, this structure recognizes the systemic presumption in favor of the choice of state law and the need to identify affirmatively specific federal interests in order to overcome that presumption.³⁸ Other aspects of federalism, however, that relate not to the choice of the applicable rule but to the very power to choose in the first instance were submerged in *Three Rivers* when the court, based on its ruling that *Erie* did not apply, assumed thereby that there were no limits on its competence.³⁹ Although the Third Circuit was correct in deciding that *Erie* is inapplicable to the facts of *Three Rivers*, an analysis of the principles of federalism that sustained the decision in *Erie* serves to identify limits on the law-making power of the federal courts even where, as in *Three Rivers*, the federal courts adjudicate rights created by federal law.

II. THE STRUCTURE OF FEDERALISM AND THE LIMITS ON FEDERAL JUDICIAL POWER

In *Erie*, the substantive issue before the court concerned the standard of care owed by the Erie Railroad to a pedestrian who had been injured by a passing train while walking along Erie's right of way in Pennsylvania.⁴⁰ The Court of Appeals had considered the issue of the standard of care to be a matter of "general law,"⁴¹ which under the rule of *Swift v. Tyson*,⁴² could be formulated by the federal judiciary. The doctrine of *Swift* was based on an interpretation of the Rules of Decision Act, which provided that "the laws of the several states, except where the constitution, treaties or statutes of the United

³⁷ The choice of state law may differ in significant ways from the mandatory application of state law under the *Erie* doctrine. Essentially, where federal courts are competent to choose or reject state law, they act wholly outside of the area in which *Erie* and its progeny operate. Thus, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), which required federal courts in diversity actions to utilize the choice of law rules of the forum state is inapplicable where state law applies as a matter of federal choice. Similarly, competent federal courts are free of collateral *Erie* doctrines which direct the determination of what is the state law. See *King v. Order of United Comm'l Travelers*, 333 U.S. 153, 161-62 (1948); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940). Finally, unlike the required application of state law, federal choice of state law permits both the examination of the merits of the state rule and the rejection of that rule where its application would conflict with federal policy. See, e.g., *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946). For a detailed discussion of the implications of federal choice of state law and an investigation of the relevant criteria, see Mishkin, *Federal Law*, *supra* note 5, at 810-834.

³⁸ See Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

³⁹ 522 F.2d at 888-89.

⁴⁰ 304 U.S. at 69-70. The Court made clear that the importance of the case lay not in the resolution of the substantive issue, but in the resolution of the question posed at the beginning of the opinion: "The question . . . whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." *Id.* at 69.

⁴¹ *Tompkins v. Erie R.R.*, 90 F.2d 603, 604 (2d Cir. 1937).

⁴² 41 U.S. (16 Pet.) 1 (1842).

FEDERAL JUDICIAL LAW-MAKING POWER

States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."⁴³ The phrase "the laws of the several states" was interpreted in *Swift* to encompass only the state statutory law, thus permitting the federal courts to disregard the decisional law of the states.⁴⁴

In disapproving the *Swift* doctrine, the Court in *Erie* first concluded, on the basis of new historical evidence,⁴⁵ that the statutory construction of *Swift* was erroneous; the word "laws" had been intended to mean both decisional and statutory law.⁴⁶ However, the court did not rest its holding solely on the statutory construction ground. The decision to overrule *Swift* was also based on the finding that *Swift* resulted in an unconstitutional assumption of law-making power by the federal judiciary.⁴⁷ At first, commentators reviewing the decision dismissed the significance of the constitutional argument by pointing out that the court had failed to identify any constitutional provision which was directly violated by the *Swift* doctrine.⁴⁸ Recent commentators, however, have recognized the significance of the constitutional argument finding that it is precisely the absence of any explicit constitutional provision conferring power on the federal courts unilaterally to develop substantive law that renders the doctrine of *Swift* an unconstitutional assumption of power.⁴⁹ The decision in *Erie* therefore recognized an implicit diffusion of law-making power in our federal system inferable from the general scheme of the constitution rather than from any specific provision.⁵⁰

A schema of the allocation of law-making initiative among the federal and state legislatures and judiciaries indicates in a general way, the limits on federal judicial competence. Within this structure, the starting point for the regulation of individual action has been the common law as applied and interpreted by state courts.⁵¹ State legislatures act in light of this common law. By altering the common law or

⁴³ Judiciary Act of 1789 ch. 20 § 34, 1 Stat. 92, as amended 28 U.S.C. § 1652 (1970).

⁴⁴ 41 U.S. (16 Pet.) at 18.

⁴⁵ See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 85-88 (1923).

⁴⁶ 304 U.S. at 72-73.

⁴⁷ *Id.* at 77-78.

⁴⁸ Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278 (1946); Keefe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORN. L.Q. 494, 497 (1949).

⁴⁹ Ely, *supra* note 6, at 702-04; Hill, *supra* note 5, at 437-45. One commentator has argued that although it is unusual for a constitutional decision to avoid making specific reference to the Constitution, if the Court says it is deciding a case on constitutional grounds, it is wisest to assume that such a statement is not dicta. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 231-32 (2d ed. 1970).

⁵⁰ Mishkin, *The Thread*, *supra* note 5, at 1685.

⁵¹ H. HART & A. SACKS, *THE LEGAL PROCESS*, 185-86 (tent. ed. 1958); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954).

adding to it, state legislatures give expression to the interests of a state government in regulating the activity of its citizens.⁵² Action by state legislatures, of course, serves to direct the state judiciary, but where the legislature has not acted the residual power to make law remains in the state courts.⁵³

On the national level, the law-making initiative rests with the Congress.⁵⁴ Congress has constitutional authority to change or supplant state law in effectuating what is necessary and proper to implement permissible national interests.⁵⁵ No such general constitutional authority is conferred on the federal courts.⁵⁶ Therefore, federal courts derive law-making power from the presence of a federal interest that merits judicial protection or elaboration.⁵⁷ The proposition that "[t]here is no federal general common law"⁵⁸ recognizes that fed-

⁵² H. HART & A. SACKS, *THE LEGAL PROCESS* 186-87 (tent. ed. 1958).

⁵³ *Id.* at 186.

⁵⁴ Commentators have disagreed over whether the denial of legislative initiative in the federal courts is constitutionally required or congressionally imposed by the Rules of Decision Act. Compare Ely, *supra* note 6, at 700-06 with Mishkin, *The Thread*, *supra* note 5, at 1682-86. The more compelling argument seems to be that the Act was not simply a discretionary enactment creating an enclave of state law protected from displacement by the federal courts; rather, this Act seemed to recognize a state/federal power structure that was constitutionally required. This position draws support from the frequent statement in case law that the Rules of Decision Act merely declared the rule that would have existed absent any statute. *Guaranty Trust Co. v. York*, 326 U.S. 99, 103-04 (1945); *Mason v. United States*, 260 U.S. 545, 559 (1923). Further, it seems alien to the careful attention to separation and limitation of institutional power in the constitution to conclude that absent a Rules of Decision Act, individual federal judges would possess the substantive law-making power of the representative national legislature.

Consideration of the allocation of political power in the federal system reinforces the judgment that limitations on the law-making power of the federal judiciary are constitutionally and not just legislatively mandated. The primary vehicles for change in the common law are the state legislatures, which permit the most direct input by the population affected by those changes. To argue that federal power to supplant that state law is constitutionally exercised only by the Congress is to recognize the representative political power of the states in that institution. The absence of comparable input into the federal judiciary seems to justify restrictions on judicial power that do not apply to the national legislature. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

⁵⁵ U.S. CONST. art. I, § 8.

⁵⁶ Mishkin, *The Thread*, *supra* note 5, at 1682-83.

⁵⁷ Since it is likely that Congress has the power to adopt substantive rules for liability for accidents on interstate routes under the Commerce Clause, *Erie* may be viewed as illustrating the lack of federal judicial competence where Congress *has not* acted, and not the lack of judicial competence where Congress *cannot* act. However, under the rule of *Swift*, the federal courts were not making substantive law to apply in state courts. Rather, federal courts were fashioning substantive rules that applied to state-created causes of action litigated in federal courts. See Mishkin, *The Thread*, *supra* note 5, at 1684 n.10. Though it is not entirely clear, it does not seem that Congress has the Constitutional authority to enact laws to be applied only to diversity cases. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956). But see Ely, *supra* note 5, at 706-07 n.77. Thus, it would seem that in fact *Erie* represented a situation where the federal courts as well as Congress lacked competence.

⁵⁸ *Erie*, 304 U.S. at 78.

FEDERAL JUDICIAL LAW-MAKING POWER

eral courts, unlike state courts, have no residual power to make law.

Given these general limitations on the competence of the federal courts, the specific relationships between federal legislative action, state law, and federal judicial competence can be discerned. Federal legislation is interstitial, rarely occupying an entire field.⁵⁹ It is virtually impossible to develop a self-sufficient body of statutory law that gives definitive treatment to all concepts, relationships and transactions that are implicated in the operation of a statutory program. Federal legislation is thus enacted against the backdrop of state law and relies upon state law to give contextual muscle to skeletal federal statutory schemes.⁶⁰ At the same time, effective federal action requires vesting in federal courts the power to effectuate the legislative policies and programs by judicially filling out the statutory patterns.⁶¹ The presumption in favor of the applicability of state law represents deference on the part of the federal judiciary to congressional reliance on state law to supplement federal enactments.⁶² The federal judiciary supervises this interaction between federal and state law and chooses to interpose federal common law only where a uniform rule is necessary to effectuate federal interests⁶³ or where a conflict between the relevant state law and federal policies can be identified.⁶⁴

Because it is interstitial by nature, federal legislation is limited in scope;⁶⁵ not only does the corpus juris of the states fill in interstitially but also state law picks up at the boundaries of the limited federal action. To the extent that federal legislative action encompasses particular issues, federal courts have law-making competence. Federal courts thus serve to backstop the interstitial application of state law, ensuring that federal policies are carried out by applying uniform federal rules or by supplanting state law *where necessary*. To the extent that federal interests do *not* encompass a particular issue, however, state law supplies the applicable rule, not interstitially as a matter of federal choice, but rather as a reservoir of substantive law which lies beyond the confines of federal choice and which picks up at the limits of congressional action. Where federal legislative interests are absent then, federal courts have no basis on which to assert competence and therefore state law should apply of its own force.

In light of this analysis, it is imprecise to conclude that the competence of the federal courts is a function of the source of the right sued upon. More precisely, federal judicial competence is a function

⁵⁹ P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 470-71 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*].

⁶⁰ *Id.* at 471.

⁶¹ Mishkin, *Federal Law*, *supra* note 5, at 800.

⁶² *See, e.g.*, *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966).

⁶³ *See, e.g.*, *Clearfield Trust Co. v. United States*, 381 U.S. 363, 367 (1943).

⁶⁴ *See, e.g.*, *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946).

⁶⁵ *HART & WECHSLER*, *supra* note 51, at 470-71.

of the scope of cognizable federal interests.⁶⁶ The latter proposition recognizes that a threshold determination of general competence may not be sufficient to reach all of the specific issues that might affect a substantive federal right. Within the context of general competence, certain issues may arise which fall beyond the scope of any federal interest and therefore, should be controlled by state law.

Although federal courts have not explicitly articulated this proposition,⁶⁷ they seem functionally to follow it in at least three contexts. Even when general competence in the federal judiciary has been acknowledged, state law has been seen to apply of its own force in admiralty cases, cases in which national sovereignty is implicated, and cases where federal courts act to effectuate federal statutory policies. In each of these contexts, judicial competence seems to have been limited to the cognizable federal interests.

III. COMPETENCE AS A FUNCTION OF FEDERAL INTERESTS

A. *Limits on Judicial Power in Admiralty*

Prior to the adoption of the Constitution, maritime law existed as a distinct body of law outside the control of the particular states.⁶⁸ The Constitution institutionalized this situation by declaring jurisdiction over admiralty matters to be exclusively within the federal judicial power.⁶⁹ The unique history of maritime law and this jurisdictional power have combined to invest substantive law-making power in the federal courts and in the national legislature.⁷⁰ The resulting opera-

⁶⁶ While this comment considers that the issue of competence requires an analysis of the presence or absence of federal interest, one commentator has suggested that the line of *Erie* cases is understandable as involving the weighing of the respective state and federal interests. Leathers, *Erie and its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791, 792 (1974).

The role of *some* sort of interest in analysis in *Erie* deliberations was first suggested by the Court in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). There, the Court reasoned that an important federal interest — in that instance a trial by jury — would warrant the application of a federal rule. The significance of this analysis was diluted when the right to a jury trial was deemed constitutionally required, *Simler v. Conner*, 372 U.S. 221, 222 (1963), since federal courts are always competent to supplant an unconstitutional state rule.

Citing *Byrd*, the Fourth Circuit has applied an interest analysis to determine that the existence of a state door-closing statute would not bar a case from federal court since the federal interest in providing a convenient forum pursuant to the court's constitutional power to have jurisdiction of cases litigated by parties of diverse citizenship prevails over the state interest in relieving docket congestion. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965). See also *Miller v. Davis*, 507 F.2d 308, 313-18 (6th Cir. 1975).

⁶⁷ Cf. *United States v. Yazell*, 382 U.S. 341, 357 (1966); see also note 157 *infra*. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1055 (1965).

⁶⁸ G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 10-11 (2d ed. 1975).

⁶⁹ U.S. CONST. art. III, § 2. This judicial power was implemented by section 9 of the Judiciary Act of 1789, 1 Stat. 77 [now 28 U.S.C. § 1333 (1970)].

⁷⁰ See Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 Harv. L. Rev. 1214 (1954).

FEDERAL JUDICIAL LAW-MAKING POWER

tion of this federal power is comparable to the development of substantive law within a state through the interaction of the common law and the direction of the legislature with general law making authority vesting in the state judiciary. Therefore, admiralty embodies a uniform body of federal substantive law, to the exclusion of the interstitial input of state law.⁷¹

One prominent exception to this general scheme may be found where state law has been applied to permit a cause of action for wrongful death.⁷² It is in this context that limits on judicial competence become apparent. The problem of providing a remedy for wrongful death first arose in *The Harrisburg*,⁷³ where a common law remedy for wrongful death was denied under maritime law by the Supreme Court.⁷⁴ In *Western Fuel Co. v. Garcia*,⁷⁵ however, to mitigate the hardship of this rule, state law was permitted to supplement maritime law to provide a statutory basis for a wrongful death action. The inclusion of state law, while held inoffensive to the principle of the uniformity of maritime law,⁷⁶ generated questions concerning the power of the federal courts to oversee the application of state law.⁷⁷

In *The Tungus v. Skovgaard*,⁷⁸ the Supreme Court considered whether state law merely provided a remedy for wrongful death that was otherwise denied under federal law, or whether state law also supplied the particular rules that were determinative of liability.⁷⁹ The case involved the death of Skovgaard, the maintenance foreman of the company engaged to discharge the Tungus' cargo of coconut oil, who slipped on previously spilled oil and fell to his death.⁸⁰ Congress

⁷¹ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

⁷² *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921).

⁷³ 119 U.S. 199 (1886).

⁷⁴ *Id.* at 213. The rule of *The Harrisburg* has been reversed and admiralty now allows a common law remedy for wrongful death. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970).

⁷⁵ 257 U.S. 233, 242 (1921).

⁷⁶ *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959).

⁷⁷ Prior to the decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), see note 74 *supra*, the search for a rule of decision presented an intriguing puzzle. Under the savings clause, states courts were granted jurisdiction to hear cases arising in admiralty. 28 U.S.C. § 1333(1) (1970). A state court hearing a claim was, of course, bound to apply uniform maritime law. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917). In a claim for wrongful death, however, maritime law permitted state wrongful death statutes to serve as a basis for a wrongful death claim in admiralty that was not recognized under federal common law. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). Thus, states were in the position of applying federal maritime law, which in turn applied state law. Further, in claims brought under federal jurisdiction, the federal court would have to determine additionally whether the state, in applying its own wrongful death statute, would apply special maritime standards or general tort standards to determine liability for the maritime tort. *The Tungus v. Skovgaard*, 358 U.S. 588, 595 (1959).

⁷⁸ 358 U.S. 588 (1959).

⁷⁹ *Id.* at 591.

⁸⁰ *Id.* at 589.

had passed both the Jones Act and the Death on the High Seas Act which provided for recovery for wrongful death.⁸¹ However, since Skovgaard was not a seaman he was not covered by the Jones Act and since his death occurred while the *Tungus* was docked within the territorial waters of New Jersey, the Death on the High Seas Act was inapplicable.⁸² Consequently any right of recovery by the plaintiff depended solely on the New Jersey wrongful death statute, there being no common law maritime action for wrongful death.⁸³ The issue presented to the Court was whether New Jersey law on wrongful death encompassed a cause of action based on the unseaworthiness of a vessel.

Four members of the Court in dissent argued that it was unnecessary to examine the scope of the New Jersey statute.⁸⁴ It was reasoned that state law merely supplies a remedy unavailable under maritime law for a breach of duty of care that is in fact recognized under maritime law. The dissent therefore considered that the incorporation of a state's remedy does not preclude federal judicial law-making power to declare the elements of liability and the standards to be applied.⁸⁵

The majority held, however, that state law applied as an integrated whole since the sovereign power creating a right "includes of necessity the power to determine when recovery shall be permitted and when it shall not."⁸⁶

On the basis of the holding in *The Tungus* requiring state law to be applied as an integrated whole and denying federal judicial power to determine the elements of the right established by the law, the Supreme Court in *Hess v. United States*,⁸⁷ similarly upheld the applicability of an Oregon wrongful death statute to permit recovery that was unobtainable under maritime law.⁸⁸ The Court did so even though the Oregon liability law which served as the basis for the claim required a standard of care to avoid liability more stringent than the standard applied under admiralty standards.⁸⁹ Justice Harlan, in a complex and rigorous dissent⁹⁰ which would have denied the applicability of the Oregon statute altogether, evaluated the case in light of the extent of the federal competence issue.

First, Justice Harlan distinguished *The Tungus*, asserting that different issues were involved in the respective cases. Justice Harlan pointed out that in *The Tungus* the issue was whether *the elements of*

⁸¹ *Id.* at 590-91.

⁸² *Id.* at 591.

⁸³ See text at notes 72-77 *supra*.

⁸⁴ 358 U.S. at 600-04.

⁸⁵ *Id.* at 608-09.

⁸⁶ *Id.* at 594.

⁸⁷ 361 U.S. 314 (1960).

⁸⁸ *Id.* at 321.

⁸⁹ See *id.* at 323 (Harlan, J., dissenting).

⁹⁰ *Id.* at 322.

FEDERAL JUDICIAL LAW-MAKING POWER

state law as applied by the state were controlling, where state law has been accepted as the vehicle for a wrongful death action.⁹¹ Harlan accepted the conclusion that state law must apply as an integrated whole since there is no basis on which the federal court could vary the limitations and conditions of a right which involved no federal interests.⁹² He found, however, that *Hess* presented a different issue, involving a threshold determination whether the state law as an integrated whole is *compatible* with federal interests, in this instance those represented by general maritime law.⁹³ Since the statute applied in *The Tungus* required a standard of care consistent with the duty of care required under general maritime law, its application would make "no meaningful inroads on federal interests."⁹⁴ On the other hand, the Oregon statute at issue in *Hess* imposed a duty of care more stringent than would be required in the adjudication of maritime torts not resulting in death. Thus, the effect of applying the Oregon statute would be to permit the states to encroach on federal interests.⁹⁵ Noting that under *The Tungus*, the federal courts do not have the authority to alter the standards applied under state law, Justice Harlan concluded that the Court should, in the exercise of its power to protect federal interests, not allow the Oregon statute to supplement maritime law.⁹⁶

In so arguing, Justice Harlan apparently recognized that judicial law-making competence may exist, and yet a court may still lack competence with respect to certain issues. Because of general federal control of admiralty matters, there is certainly a federal interest in whether a claim for wrongful death under state law will be permitted to supplement maritime law. As a function of the federal interest, general judicial competence exists to deny the application of state law where it impinges on established interests. This law-making power, however, is not an unlimited one allowing federal courts on one hand to adopt a state-created remedy and on the other to retain the power to establish independently the conditions and limitations of that right. Rather, once state law is adopted by federal choice as a supplement to maritime law, the particular conditions and limitations established by the state implicate no further federal interests. Therefore, even in the context of general judicial law-making power, where state law is chosen as compatible with federal interests, the elements of the state created right apply of their own force.

B. Limits on Judicial Power in the Effectuation of National Sovereignty

The power to develop federal common law for the resolution of issues concerning national sovereignty was established five years after *Erie* in *Clear-*

⁹¹ *Id.*

⁹² See *id.* at 330-33.

⁹³ *Id.* at 322.

⁹⁴ *Id.* at 332.

⁹⁵ *Id.* at 333-34.

⁹⁶ *Id.* at 338-39.

field Trust Co. v. United States.⁹⁷ In *Clearfield*, the question on review involved the rights and duties of the United States on commercial paper it had issued pursuant to its Constitutional and statutory powers.⁹⁸ Clearfield Trust Co. had cashed a government check that had been stolen and originally cashed by means of a forged endorsement.⁹⁹ Clearfield Trust Co. then endorsed the check to the Federal Reserve Bank for payment guaranteeing all prior endorsements.¹⁰⁰ Over nine months later, the federal government notified Clearfield Trust of the fact of the forgery and demanded reimbursement.¹⁰¹ Under the applicable state law, the delay in notification constituted a complete defense.¹⁰² The Supreme Court held that despite the fact that no specific federal statutory provision relates to the facts of the case, the federal court was competent to choose the applicable rule.¹⁰³ The Court reasoned that the rights and duties of the United States were rooted in federal sources in that the United States was acting as national sovereign in the exercise of its constitutional function when it issued and paid the check.¹⁰⁴

The recognition that federal courts are competent where national sovereignty is involved established a wide sphere of judicial law-making initiative.¹⁰⁵ However, limits on that power were sug-

⁹⁷ 318 U.S. 363 (1943).

⁹⁸ *Id.* at 366.

⁹⁹ *Id.* at 364-65.

¹⁰⁰ *Id.* at 365.

¹⁰¹ *Id.*

¹⁰² *Id.* at 366.

¹⁰³ *Id.* at 367. The Court in *Clearfield* chose to apply uniform federal law as the rule of decision in order to avoid subjecting the rights and duties of the United States to exceptional uncertainty. *Id.* While the assumption of competence by the Court seems justified by the national interests involved, the choice of a uniform rule has been criticized. See Mishkin, *The Vagueness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 830-32 (1957).

¹⁰⁴ 318 U.S. at 366-67.

¹⁰⁵ Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1039 (1967). The wide scope of this law-making initiative was recently reaffirmed by the Supreme Court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1972). In *Little Lake*, the Court held that federal and not state law governs government acquisition of land authorized by the Migratory Bird Conservation Act, 45 Stat. 1222, 16 U.S.C. § 715 *et seq.* In so doing, the majority reasoned that where the transactions at issue bear heavily on a federal regulatory program, federal courts have the law-making power to fill out the statutory patterns enacted by Congress. 412 U.S. at 592-93. Applying the law to the facts, the Court concluded that since *Little Lake* involved "... the interpretation of a land acquisition agreement (a) explicitly authorized though not precisely governed by the Migratory Bird Conservation Act and (b) to which the United States is a party," 412 U.S. at 594, uniform federal law was applicable to the land acquisition at issue.

While the Court's conclusion that, in fact, the Migratory Bird Conservation Act embodies federal interests in the regulation of government acquisition of state property is unpersuasive, particularly since the majority opinion acknowledged that the acquisitions are "not precisely governed by the Migratory Bird Act" (both Justice Rehnquist and Justice Stewart find no such interests and conclude that state law should apply), the Court's rationale is instructive for federal-state choice of law principles. By approaching the problem not at one of identifying the source of the right sued upon but instead, as

FEDERAL JUDICIAL LAW-MAKING POWER

gested thirteen years later in *Bank of America National Trust and Savings Association v. Parnell*.¹⁰⁶ In *Bank of America*, stolen government "bearer" bonds were presented for collection by one Parnell on behalf of a second party.¹⁰⁷ The issue before the court was whether Parnell had converted the bonds in good faith without knowledge of the defect in the title.¹⁰⁸ In seeking to resolve that issue, the problem arose as to whether federal or state law would control the assignment of the burden of proof.¹⁰⁹ The Court of Appeals for the Third Circuit, following *Clearfield*, applied federal common law and placed the burden of proof on the Bank to show notice and lack of good faith on the part of Parnell.¹¹⁰ The Supreme Court reversed, holding that the litigation, while involving government bonds, was entirely between private parties and did not implicate federal interests.¹¹¹ Consequently, state rules as to burden of proof and good faith would be the controlling law.¹¹²

In concluding that state law would determine the liabilities of the parties in private transactions involving the government bonds, the Court gave no explicit indication whether state law applied on the basis of federal judicial choice or on the basis that the federal courts were incompetent to do otherwise. However the court stated:

The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of government paper between private persons, is that the floating of securities of the United States might somehow be affected by the local rule of a particular state regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.¹¹³

If there is no cognizable federal interest in the transaction in question on what basis would the federal courts have the authority to choose or to reject a particular state's rule? Acknowledging the absence of any

one of evaluating the scope of federal interests, the court seemingly acknowledged *sub silentio* what has been the operative principle: that federal judicial law-making power is a function of the scope of federal interests. As in *Clearfield*, 318 U.S. 363 (1943) federal courts assert law-making power where federal interests can be identified. This comment is suggesting the converse of this approach, that where analysis reveals no federal interests in a particular issue (even where the underlying right arises under federal law) there is no law-making power in the federal judiciary.

¹⁰⁶ 352 U.S. 29 (1956).

¹⁰⁷ *Id.* at 30-31.

¹⁰⁸ *Id.* at 31.

¹⁰⁹ *Id.* at 31-32.

¹¹⁰ *Bank of America Nat'l Trust & Sav. Ass'n v. Rocco*, 226 F.2d 297, 299 (3d Cir. 1955).

¹¹¹ *Bank of America*, 352 U.S. at 33.

¹¹² *Id.* at 33-34.

¹¹³ *Id.*

federal interest seems to be merely another way of expressing the fact that no federal policy needed to be implemented or safeguarded by the federal judiciary. Absent the factor of a federal interest, the reservoir of state law rather than the island of federal law would govern the transaction.

The Court's dictum in *Bank of America* reinforces this conclusion. The court cautioned:

We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest to be governed by federal law in all situations merely because it is a suit between private parties, or that it is beyond the range of federal legislation to deal comprehensively with Government paper.¹¹⁴

The first part of the statement recognizes the common understanding that federal interests may be involved in suits between private parties and that where such interests are present, even in suits arising under state law, federal law governs those issues. The latter portion of the Court's dictum is more revealing since it would seem obvious that if the federal courts have law-making competence with respect to all issues involving Government paper, certainly the Congress would have similar competence. It is only where certain issues are found to be beyond the competence of the federal courts where Congress has not acted in that it is useful to clarify that it is not necessarily beyond the competence of the legislature to act with respect to those same issues.¹¹⁵ Thus, the Court seems to be acknowledging the different limits applicable to the law-making power of the courts and the law-making power of the legislature. As an example of such limits on the judiciary *Bank of America* can be best understood, therefore, as recognizing that the simple fact that Government bonds are involved is, without more, insufficient to authorize federal judicial law-making power, leaving state law to apply of its own force. Thus, the case seems to warrant the conclusion that the Court lacked law-making competence and that as a result, state law applied of its own force.¹¹⁶

C. *Limits on Judicial Power in the Implementation of Federal Statutes*

The third context in which general federal judicial competence is recognized but seemingly limited by the scope of federal interests involved is the enforcement and implementation of federal legislative policies and programs. The existence and breadth of this judicial power was candidly recognized by Justice Jackson, concurring in

¹¹⁴ *Id.* at 34.

¹¹⁵ See discussion at notes 5-7 *supra*.

¹¹⁶ But see *Moor v. County of Alameda*, 411 U.S. 693, 702-03 n.12 (1972) (*Bank of America* cited in dictum as example of federal choice of state law); see also Mishkin *supra* note 103 at 824-28 wherein *Bank of America* is assumed as an example of the federal judicial choice of state law and the principles of that choice are analyzed.

FEDERAL JUDICIAL LAW-MAKING POWER

*D'Oench Duhme & Co. v. Federal Deposit Insurance Corp. (F.D.I.C.).*¹¹⁷ The F.D.I.C. had made a loan to a commercial bank, receiving as part of the collateral security a note given to the bank by the defendant.¹¹⁸ The bank defaulted on the loan and the F.D.I.C. sued to collect on the note.¹¹⁹ The bank asserted that the note lacked consideration and had been given to the bank as collateral only on condition that it would not be enforced.¹²⁰ The majority opinion barred this defense as violative of federal policy but did not explicitly identify the source of the Court's power to apply federal common law.¹²¹ Justice Jackson's concurring opinion addressed this specific issue.

After acknowledging that no statutory provision concerning the federally-established F.D.I.C. purported to define the rights of that agency with regard to the transaction under consideration,¹²² Justice Jackson posed the question "whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common-law sources."¹²³ Justice Jackson answered this question by arguing that federal common law is necessary to implement the Constitution and federal statutes.¹²⁴ Where the policies of the federal government are implicated the federal courts must be empowered to effectuate those purposes.¹²⁵ The F.D.I.C. had been created to provide security for the entire banking and credit structure.¹²⁶ To achieve this purpose, Justice Jackson argued, there must be reliance on the integrity of bank statements.¹²⁷ Allowing a note which was knowingly used for the purpose of disguising a loss to be immune from collection would permit a continuing fraud on creditors and would undercut the goal of stability sought by the establishment of the F.D.I.C.¹²⁸ Consequently, federal judicial law-making power is warranted not only when it is necessary to implement explicit statutory provisions, but also when it is necessary to ensure the effectuation of implicit policies, as in the instant case.¹²⁹

Notwithstanding the breadth of the judicial law-making power explained by Justice Jackson, such power is not without limits. An attempt to identify conceptually the limits of federal judicial law-making power has been made above in the discussion on the structure of

¹¹⁷ 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring).

¹¹⁸ 315 U.S. at 454.

¹¹⁹ *Id.* at 453-54.

¹²⁰ *Id.* at 456.

¹²¹ *Id.* at 458.

¹²² *Id.* at 468 (Jackson, J., concurring).

¹²³ *Id.*

¹²⁴ *Id.* at 472.

¹²⁵ *Id.* at 469-70.

¹²⁶ *Id.* at 472.

¹²⁷ *Id.*

¹²⁸ *Id.* at 472-73.

¹²⁹ *Id.* at 472.

law-making power in a federalist system.¹³⁰ There it was submitted that while federal courts, in effect, "backstop" federal legislation by resolving issues that arise in the interstices, certain issues may arise that are beyond the boundaries of congressional concern and as such are beyond the scope of federal judicial competence. The difficulty arises in trying to determine which issues fall in the interstices and which are beyond the scope of cognizable federal interests. One possible solution to this problem is reflected in the treatment of issues in a horizontal conflict of laws situation, in which the substantive laws of one state may be applied in the courts of another. Generally, where the forum state applies the tort law of another state, it will also apply those rules which have been fashioned by the other state and which are essential elements of the recognized right.¹³¹ Subsidiary issues the resolution of which do not affect the nature of the substantive right, merit a separate determination of the governing rule. Since these issues—primarily those matters sounding in contract, such as the interpretation of releases,¹³² the validity of assignments,¹³³ and competency to contract¹³⁴—cannot affect revisions of the basic right, they have a legal identity distinct from the underlying right. Thus, although one state supplies the rules determining the elements of injury, the standards of liability, and the conditions on the remedy, the release of that right may be interpreted by the rules of another state.

This difference between issues that are part and parcel of the right and those that are subsidiary helps identify the scope of the interest of the sovereign creating that right. Where the issue under consideration is part and parcel of a federally created right, the power to resolve the issue rests with the sovereign creating the right.¹³⁵ Thus, the fact of federal creation of a right manifests sufficient interest in the elements of that right to confer competence on the federal courts to choose the applicable law with respect to all issues integrally related to that right.

Where issues integrally relate to the federal right, the proposition that the competence of the federal courts is a function of the source of the right sued upon provides an accurate test for competence. For example, there is no question that where Congress has enacted a federal copyright statute granting renewal rights to children of deceased copyright holders, the resolution of the question of whether illegitimate children are within the scope of the statute is within the competence of the federal judiciary.¹³⁶ Similarly, where a federal statute has permitted the taxation of governmental real property by a state, the federal courts are competent to determine the

¹³⁰ See text at notes 59-64 *supra*.

¹³¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 156-74 (1971).

¹³² *Id.* at § 188.

¹³³ *Id.* at § 209.

¹³⁴ See *id.* at § 198.

¹³⁵ See *id.* at § §145, 156-74.

¹³⁶ *De Sylva v. Ballentine*, 351 UmS. 570, 580 (1956).

FEDERAL JUDICIAL LAW-MAKING POWER

meaning of "real property" since the issue is an integral element of the right itself.¹³⁷

Where the issue under consideration is not integrally bound up with the right, but is subsidiary, the mere fact of federal creation of the right seems insufficient to confer competence on the courts. It is in this situation that the proposition that the competence of the federal courts is a function of the right sued upon is imprecise. Federal competence would be warranted with respect to subsidiary issues only if the statute were to identify explicitly a federal interest in the matter, or if the sweep of congressional policy were to encompass that issue. This analysis is compatible with cases in which federal competence to choose the rule of decision for subsidiary issues has been asserted.

In *Dice v. Akron, Canton, & Youngstown R.R.*¹³⁸ the Supreme

¹³⁷ *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946). A less obvious illustration of the proposition that where the issue is an element of the right, federal courts are competent to choose the applicable rule, is found in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The plaintiff in *Zenith* sued for patent infringement. As one of its defenses Hazeltine Research Corp. claimed that it was released from liability to Zenith because of a general release executed by Zenith in settlement of an antitrust action against other co-conspirators. The Court considered various rules for determining the effect of a release of one joint tortfeasor on the remaining tortfeasors in an antitrust context, and chose to establish as the uniform federal rule a standard providing that the effect on joint tortfeasors of a release of an antitrust claim is to be determined by the intention of the parties. *Id.* at 345-47. The Court's holding bears superficial resemblance to the issues in *Three Rivers* and has in fact been cited in support of the proposition that federal law should displace state law in governing the release of antitrust claims. *Three Rivers Motors Co. v. Ford Motor Co.*, 374 F. Supp. 620, 624 (W.D. Pa. 1974). The Court's focus in *Zenith*, however, was not on a subsidiary issue sounding in contract, but rather was on a condition or limitation of the right itself.

In deciding the effect of a release of one joint tortfeasor on other joint tortfeasors, the Court did not establish a principle of construction. Rather, the Court determined the effect of a valid release on parties who did not negotiate the release. As such, the Court did not touch upon the appropriate rule for determining the validity and scope of the release relative to the parties who negotiated the contract.

Not surprisingly, in the parallel situation of horizontal conflict, the question of the effect of a release on joint tortfeasors is treated as an element of the right. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 170 (1971). The sovereign creating the right supplies the rule for releases of joint tortfeasors. *Id.*

Federal courts have similarly recognized the distinction between the federal interest in the effect of releases on joint tortfeasors and the interpretation of releases of antitrust claims. *Three Rivers*, 522 F.2d 885, 890-91 (3d Cir. 1975) of course does not follow *Zenith* and chooses to apply state law. See also *Schott Enterprises, Inc. v. Pepsico, Inc.*, 520 F.2d 1298, 1300 (6th Cir. 1975) (Ohio law allowed settlement of private antitrust claims and such settlement acted as a release); *Aamco Automatic Transmissions, Inc. v. Taylor*, 407 F. Supp. 430, 433 (E.D. Pa. 1976) (citing *Three Rivers* for proposition that general release of antitrust claims bars all claims known or unknown in contrast to rule of intent advanced in *Zenith*). Thus, the result in *Zenith* is understandable as an example of federal judicial power to act in order to fill out the elements of the right created by federal law. It does not go so far as to support the broad conclusion that federal courts may totally supplant state law with respect to genuinely contractual elements of releases.

¹³⁸ 342 U.S. 359 (1952).

Court, reversing the Ohio Supreme Court,¹³⁹ held¹⁴⁰ that federal, and not state law determined the validity of a release of a cause of action under the Federal Employers' Liability Act (FELA).¹⁴¹ In so doing, the Court reasoned that "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act."¹⁴² On the surface this argument seems to identify a release as an integral part of the right created under FELA. But this identification of the effect of the release as an element of the right is understandable not as a necessary condition but as a reflection of the particular policies implicit in FELA.¹⁴³ The social goal of FELA to alleviate the hardship suffered by railroad employees as a consequence of their employer's negligence,¹⁴⁴ combined with recognition of the generally unequal bargaining power of employees and employers, serve to justify federal judicial supervision of releases. This special interest serves to encompass such releases within the scope of federal power, thus warranting judicial law-making on the part of the federal courts.

Similarly, the subsidiary issue of the validity of an assignment was found to be encompassed by federal interests in *Wallis v. Pan American Petroleum Corp.*¹⁴⁵ Defendant Wallis had applied for mineral leases under the Mineral Leasing Act for Acquired Lands¹⁴⁶ and later executed an assignment of a one-third interest in any leases acquired under the pending applications to one McKenna. Wallis also sold to Pan American an option to purchase any lease so acquired.¹⁴⁷ Subsequently, Wallis filed parallel applications under the Mineral Leasing Act of 1920¹⁴⁸ which applied to "public domain lands."¹⁴⁹ The leases were granted to Wallis under the latter applications. McKenna and Pan American sued to enforce the assignment and the option agreement, thereby raising the substantive issue whether the written

¹³⁹ *Dice v. Akron C. & Y. R.R.*, 155 Ohio S. Rep. 185, 98 N.E.2d 301 (1951).

¹⁴⁰ 342 U.S. at 361.

¹⁴¹ 45 U.S.C. §§ 51-60 (1970).

¹⁴² 342 U.S. at 361.

¹⁴³ Justification for federal scrutiny of releases of causes of action under FELA has also been found to be rooted in the explicit statutory provision which establishes that "[a]ny contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . ." 45 U.S.C. § 55 (1970). *Apitsch v. Patapsco & Back Rivers Co.*, 385 F. Supp. 495, 504 (D. Md. 1974).

¹⁴⁴ See, e.g., *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 372-73 (1953); *Ratigan v. New York Cent. R.R.*, 291 F.2d 548 (2d Cir.), cert. den., 368 U.S. 891 (1961); *Fulgham v. Midland Valley R.R.*, 167 F. 660, 663 (C.C. Ark. 1909) rev'd on other grounds 181 F. 91 (8th Cir. 1910).

¹⁴⁵ 384 U.S. 63 (1966).

¹⁴⁶ 30 U.S.C. § 351-59 (1970).

¹⁴⁷ 384 U.S. at 65.

¹⁴⁸ 30 U.S.C. § 181 et seq. (1970).

¹⁴⁹ 384 U.S. at 65.

FEDERAL JUDICIAL LAW-MAKING POWER

agreements covered only the leases obtained under the Mineral Leasing Act for Acquired Lands.¹⁵⁰

The specific issue before the Supreme Court was whether federal or state law should determine the scope of the agreements between the private parties.¹⁵¹ The Court considered the federal policies or interest that might relate to the rights of private parties dealing in those leases.¹⁵² The Mineral Leasing Act of 1920 explicitly provided that oil and gas leases shall be assignable.¹⁵³ Additionally, the Act created certain statutory defenses rendering unenforceable options which did not comply with the statutory provisions.¹⁵⁴ These provisions and the general policies they represent reflected a sufficient federal interest in transfers of federal leases to confer competence on the federal courts to implement and safeguard those interests. However, since no uniform rule was required and since the applicable state rule posed no threat to any federal interest, the Court exercised its competence by choosing to apply state law.¹⁵⁵

Neither *Wallis* nor *Dice* confronted the situation where *no* federal interest in a subsidiary issue was identifiable and thus where the matter would be arguably beyond the scope of federal judicial competence. In both cases, federal interests in subsidiary issues were discernible in policy considerations or in explicit statutory provisions. *United States v. Yazell*¹⁵⁶ may be read to illustrate the proposition that the absence of a cognizable federal interest in a subsidiary issue places that issue beyond the law-making power of the federal courts. The Supreme Court in *Yazell* declined to decide whether state law, which was held to control, applied of its own force.¹⁵⁷ Nonetheless, the facts

¹⁵⁰ *Id.* at 65-66.

¹⁵¹ *Id.* at 67.

¹⁵² *Id.* at 69.

¹⁵³ 30 U.S.C. § 187a (1970).

¹⁵⁴ 30 U.S.C. § 184(d)(2) (1970).

¹⁵⁵ 384 U.S. at 70-71.

¹⁵⁶ 382 U.S. 341 (1966).

¹⁵⁷ The Court stated:

Although it is unnecessary to decide in the present case whether Texas law of coverture should apply *ex proprio vigore*—on the theory that the contract here was made pursuant and subject to this provision of state law—or by “adoption” as a federal principle, it is clear that the state rule should govern.

Id. at 357. By acknowledging the possibility of state law applying of its own force, the Court suggests that identification of the source of the right sued upon—here, a federal disaster loan program operating through the Small Business Administration—does not necessarily resolve the issue of competence. The natural reluctance of federal courts to identify limits on federal judicial law-making power is apparent in the fact that despite the Court's explicit decision not to resolve whether state law applied of its own force, *Yazell* has been cited as an example of interstitial federal law-making. See *Moor v. County of Alameda*, 411 U.S. 693, 702 n.12 (1972) (dictum); *United States v. Chappell Livestock Auction, Inc.*, 523 F.2d 840, 843 (6th Cir. 1975). But see *United States v. Proctor*, 504 F.2d 954, 959 (dissent) (5th Cir. 1974) where ambivalence of Supreme Court's choice of law posture is acknowledged.

of *Yazell* seem to warrant the conclusion that the Court lacked competence to supplant the state rule.

In *Yazell*, the issue concerned the competency of a party to contract with the government.¹⁵⁸ The Small Business Administration (SBA) had negotiated a disaster loan with Mr. and Mrs. Yazell. The loan was secured by a chattel mortgage and included a separate acknowledgement of Mrs. Yazell.¹⁵⁹ Under Texas law of coverture, however, a married woman could not bind her property without a previous court decree removing her disability to contract.¹⁶⁰ No such decree had been obtained, and when the government sued for collection of the debt following default, Mrs. Yazell pleaded the defense of coverture.¹⁶¹

Both the majority¹⁶² and the dissenting opinions¹⁶³ recognized that the Texas law of coverture was an archaic concept. Notwithstanding the offensiveness of this particular state law, the majority permitted the defense of coverture after identifying those details of the transaction which seemed to indicate the SBA's intent to conform to state law.¹⁶⁴ The concurring opinion by Justice Harlan entirely discounted the importance of any of the particulars of the transaction in question.¹⁶⁵ Rather, Justice Harlan determined that "the conclusion that Texas law governs the issue. . . is amply justified by the Court's appraisal of the competing state and federal interests at stake . . ."¹⁶⁶ Justice Harlan's opinion seems persuasive in that the dominant consideration in the case was the absence of any federal interest in the capacity of parties to contract with the federal program. The governmental interest identified by the Court was not the effectuation or implementation of any national policy but was merely the interest of any private creditor seeking repayment.¹⁶⁷ Thus, it may reasonably be inferred that in *Yazell* the absence of a federal interest left the judiciary without competence to supplant the state rule.

IV. THREE RIVERS RECONSIDERED

Recognition that federal judicial competence is a function of the scope of federal interests establishes a basis for the reexamination of *Three Rivers*. In *Three Rivers*, the issue under review was whether a release would be interpreted to bar an antitrust claim.¹⁶⁸ Since the issue of the interpretation of the release of a statutory right is a matter sub-

¹⁵⁸ *Id.* at 343.

¹⁵⁹ *Id.* at 345.

¹⁶⁰ TEX. REV. CIV. STAT. ANN. ART. 4626 (repealed 1970).

¹⁶¹ 382 U.S. at 343.

¹⁶² *Id.* at 343, 351.

¹⁶³ *Id.* at 361 (Black, J., dissenting).

¹⁶⁴ 382 U.S. at 346-48.

¹⁶⁵ *Id.* at 358 (Harlan, Jr., concurring).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 348.

¹⁶⁸ 522 U.S. at 887.

FEDERAL JUDICIAL LAW-MAKING POWER

subsidiary to the establishment of the right, the mere fact that the right is federally created would not automatically confer competence on the federal courts to decide independently the scope of the release.¹⁶⁹ Additionally, no explicit statutory provision provides any guidance relative to the issue of the interpretation of such releases.¹⁷⁰ Therefore, if federal judicial competence to rule independently on the validity of the release exists, it must result from policies implicit in antitrust legislation.

Although different assessments of the importance of private antitrust claims may be advanced, it may safely be assumed that private actions are an important supplement to government actions.¹⁷¹ Iden-

¹⁶⁹ The holding in *Sola Elec. Co. v. Jefferson Elec. Co.*, 371 U.S. 173 (1942), which states generally that federal law will govern the legal consequences of violations of federal statutes is inapposite to the position taken in the text. In *Sola*, the Court considered "whether a patent licensee, by virtue of his license agreement, is estopped to challenge a price-fixing clause in the agreement by showing that the patent is invalid, and that the price restriction is accordingly unlawful because not protected by the patent monopoly." *Id.* at 173. Holding that federal law will not permit local rules of estoppel to thwart the purposes of federal antitrust enforcement, *Id.* at 177, the Court reasoned that the extent and nature of legal consequences of an action proscribed by federal statute are federal questions to be resolved by reference to the statute and the policy it implements. *Id.* at 176. This holding is distinguishable from the situation in *Three Rivers* as involving not a question of whether an estoppel would be found to exist under state or under federal law but whether an estoppel could operate to shield antitrust violations. In deciding it could not, the Supreme Court identified a condition of the right itself.

A parallel exercise of judicial power in *Three Rivers* would have involved the determination whether an antitrust claim *could* be released. As a condition and limitation of the right of action, the issue of the possibility of releasing an antitrust claim would clearly have fallen within the competence of the federal courts. Unlike the matter of an estoppel, however, allowing antitrust claims to be released does not violate federal antitrust policy. See e.g. *Virginia Impression Products Co. v. SCM Corp.*, 448 F.2d 262, 266 (4th Cir. 1971), *cert. den.*, 405 U.S. 936 (1972); *Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc.*, 208 F.2d 316, 324 (10th Cir. 1953), *cert. den.*, 347 U.S. 935 (1954). That being the case, the court in *Three Rivers* faced the different question of the scope of a release that could permissibly serve, according to federal law, to bar an antitrust claim.

¹⁷⁰ See *Three Rivers*, 522 F.2d at 888; *Novak v. General Elec. Corp.*, 282 F. Supp. 1010, 1013 (E.D. Pa. 1967).

¹⁷¹ It seems neither fruitful nor necessary to precisely delineate the level of importance of private antitrust causes of action. Certainly there is considerable difference of opinion as to the centrality and effectiveness of the treble damages provision. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 1955; Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. LAW & ECON. 329 (1974); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); Wheeler, *Antitrust Treble-Damage Actions; Do They Work?* 61 CALIF. L. REV. 1319 (1973); Comment, *Antitrust Enforcement by Private Parties*, 61 YALE L.J. 1010 (1952).

Presumably, any sovereign creating a right of action in individuals is interested in the enforcement of that right. It is possible to maintain, as has the Third Circuit in *Three Rivers*, that that interest is sufficient to warrant control by the creating sovereign of all matters that affect that right. 522 F.2d at 888-89. This comment, however, views subsidiary matters sounding in contract as primarily private arrangements, even though issues of public interest may be involved. With respect to those issues, mere federal creation of the right is not sufficient to confer legislative power on the federal judiciary.

tifying the role of private party enforcement, however, does not resolve the question of the interest of the federal government in releases of private causes of actions. For example, federal antitrust policy has never been held to forbid or even discourage releases or settlements of antitrust claims.¹⁷² In fact, settlements and releases for consideration are means of implementing federal policy against anticompetitive practices.¹⁷³ The proper question is whether private party agreements affecting antitrust claims implicate any federal interest that would warrant special federal judicial scrutiny of such releases. It is submitted that any federal interest in such private arrangements is remote¹⁷⁴ and that, as a result, federal courts lack competence to choose the rule of decision with respect to releases of antitrust claims. Thus, whereas state law was applied by the Third Circuit in *Three Rivers* as a matter of federal choice, state law, in fact, should have applied of its own force in determining the scope of the release.

The absence of federal interests in *Three Rivers* may be highlighted by comparing releases of claims arising under the federal antitrust laws with those arising under the Federal Employers' Liability Act (FELA)¹⁷⁵ and the Jones Act.¹⁷⁶ Unlike issues surrounding releases of federal antitrust claims, issues pertaining to releases of FELA and Jones Act claims are resolved by federal common law.¹⁷⁷ Three considerations, however, distinguish releases of antitrust claims from releases of claims arising under either FELA or the Jones Act: (1) the degree of federal involvement with the parties to the release; (2) the relative bargaining power of the parties to the release; and (3) the impact of the release on general statutory policy.

The significant federal presence in the relationship of the releasing parties in cases arising under FELA or the Jones Act provides a basis for federal judicial scrutiny of releases that is absent where antitrust claims are involved. Both FELA and the Jones Act identify a particular class to benefit from the legislation. FELA establishes a right of action for railroad workers injured by the negligence of their employers.¹⁷⁸ The Jones Act extends similar protection to seamen.¹⁷⁹

Rather, it is necessary to find a special interest in those subsidiary matters in order to permit courts to exercise legislative authority that is otherwise reserved to the states.

¹⁷² See, e.g., *Schott Enterprises, Inc. v. Pepsico, Inc.*, 520 F.2d 1298, 1300 (6th Cir. 1975); *Virginia Impression Products Co. v. SCM Corp.*, 448 F.2d 262, 266 (4th Cir. 1971), *cert. den.*, 405 U.S. 936 (1972); *Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc.*, 208 F.2d 316, 324 (10th Cir. 1953), *cert. den.*, 347 U.S. 935 (1954).

¹⁷³ Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 HARV. L. REV. 1395, 1405 (1962).

¹⁷⁴ *cf.* *Schott Enterprises, Inc. v. Pepsico, Inc.* 520 F.2d 1290, 1300 (6th Cir. 1975) ("Releases of antitrust claims are treated the same as releases of other claims. There is no public policy against the release of any antitrust claim).

¹⁷⁵ 45 U.S.C. §§ 51-60 (1970).

¹⁷⁶ 46 U.S.C. § 688 (1970).

¹⁷⁷ *Dice v. Akron City. R.R.*, 342 U.S. 359, 361 (1952) (FELA); *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 244 (1942) (Jones Act).

¹⁷⁸ 45 U.S.C. § 51 (1970).

FEDERAL JUDICIAL LAW-MAKING POWER

These provisions are part of a system of pervasive federal regulation in which the relationship between the parties covered by the Acts is defined by federal law.¹⁸⁰ Given such federal involvement in the relationship between employers and employees, it is clear that releases of causes of action under FELA and the Jones Act fall within the sphere of federal interest.

In contrast to FELA and the Jones Act, antitrust legislation is addressed to the definition and prohibition of certain anticompetitive practices.¹⁸¹ The ultimate parties to a private antitrust action are not subject to general federal control. Thus, their private agreements executed in light of state law do not necessarily fall within the sphere of federal interests.

Perhaps the most critical distinction between releases of antitrust claims and releases of causes of action under either FELA or the Jones Act concerns the independence, bargaining strength, and sophistication of the releasing party. Persons covered under FELA or the Jones Act are directly subordinate to those parties in whose favor releases would be granted. The possibility of undue influence on the part of employers is particularly at odds with the social welfare thrust of the statutes. Consequently the government has affirmatively intervened to safeguard the goal of alleviating personal hardship caused by injuries resulting from employer negligence.¹⁸²

This protective role has been clearly articulated in *Garrett v. Moore-McCormack Co.*¹⁸³ which invoked federal law to preserve rights created under the Jones Act.¹⁸⁴ The Court quoted Justice Story's opinion on seamen's contracts which maintained:

"[Seamen] are emphatically the wards of admiralty If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation is that . . . advantage has been taken of the situation of the weaker party."¹⁸⁵

The inherent inequality in bargaining capability between employers and employees thus serves to warrant special scrutiny of purported re-

¹⁷⁹ 46 U.S.C. § 688 (1970), *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 38 (1943).

¹⁸⁰ Title 45 of the U.S. Code implements a scheme of federal control over railroads pursuant to Congress' power under the commerce clause. See *Second Employers Liability Cases*, 223 U.S. 1 (1911). Law-making authority for the Jones Act derives both from Congress' power to regulate commerce and its power to do what is necessary and proper to effectuate the federal authority over admiralty. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943). See also text at notes 57-60 *supra*.

¹⁸¹ See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 1955.

¹⁸² See note 144 *supra*.

¹⁸³ 317 U.S. 239 (1942).

¹⁸⁴ *Id.* at 246-47, citing *Harden v. Gordon*, Fed. Cas. No. 6047, at pp 480, 485.

¹⁸⁵ 522 F.2d at 888.

leases of claims under FELA and the Jones Act.

Parties to release of antitrust claims, however, are not in the continuing fixed relationship of employer and employee. Rather, such parties are business entities presumably familiar with the bargaining process. Disparities of economic power may, of course, exist. Nonetheless, businesses retain their essential independence to participate in arms length bargaining. The facts of *Three Rivers* illustrate this circumstance. The president of Three Rivers was represented in negotiations for the release by his attorney.¹⁸⁶ Although most of the terms of the agreement were fixed by Ford Motor Company, Three Rivers was able to negotiate a specific exception to the general release proposed by Ford.¹⁸⁷ At all times during the negotiations Three Rivers thus operated as an independent entity with the power and presence to decline to sign any release. While one party might have economic leverage in such negotiations, this possibility does not seem to warrant special federal protection of the bargaining process.¹⁸⁸ Rather, the applicable state rules for avoiding contracts would provide protection for parties to such private agreements.

Finally, the release of a cause of action under FELA or the Jones Act has policy implications that are absent from the area of antitrust claims. The release of a personal injury claim extinguishes any right to further compensation. Since the thrust of both statutes is to compensate for the hardship of personal injury,¹⁸⁹ the federal government is understandably reluctant to approve such releases absent convincing evidence that the releasing party has been adequately compensated.¹⁹⁰ A release of an antitrust claim, on the other hand merely extinguishes the private cause of action for redress of injuries.¹⁹¹ The government remains free to enforce public policy by proceeding against the released party.¹⁹² Since the public policy against anticompetitive practices is not exclusively dependent on the private action, it is not necessary to the effectuation of public policy to have federal supervision of releases of private party claims.

The distinctions between releases of antitrust claims and releases of claims under FELA and the Jones Act indicate significant differences in the respective levels of federal interest in the issue of interpretation of the releases. Since there does not appear to be any special considerations that would bring the interpretation of releases of antitrust claims within the sphere of federal interest, it must be

¹⁸⁶ *Id.*

¹⁸⁷ The argument of economic hardship has been uniformly disapproved as a basis for avoiding a release of an antitrust claim. *E.g.*, *Suckow Borax Mines Consol. Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950), *cert. den.*, 340 U.S. 48 (1951); *S.E. Rondon Co. v. Atlantic Richfield Co.*, 288 F. Supp. 879 882 (C.D. Cal. 1968).

¹⁸⁸ See note 144 *supra*.

¹⁸⁹ *E.g.*, *South Buffalo Ry. v. Ahern*, 34 U.S. 367, 372 (1953).

¹⁹¹ *Three Rivers*, 522 F.2d at 892.

¹⁹² *S.E. Rondon Co. v. Atlantic Richfield Co.*, 288 F. Supp. 879, 882 (C.D. Cal. 1968).

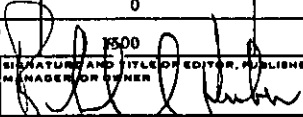
FEDERAL JUDICIAL LAW-MAKING POWER

concluded that the issue is beyond the limits of federal judicial competence. The issue arises on the legislative landscape where state law, and not the federal courts, ultimately provides the backstop for federal legislative action. Consequently, state law should have applied of its own force in *Three Rivers* as the rule of decision for the interpretation of the release.

CONCLUSION

The principles of federalism grounded in the Constitution and implemented in the Rules of Decision Act impose limits on the law-making power of the federal courts. An analysis of the structure of federalism identifies those limits as defined by the scope of cognizable federal interests. In litigation concerning federal statutory programs, issues integrally related to the statutory rights are within the sphere of federal interests and as such are proper matters for the interstitial law-making of the federal courts. Where subsidiary issues sounding in contract are involved, the general federal competence may not extend as far. Thus, an independent determination of judicial law-making power must be made relative to the subsidiary issue. This determination involves an examination whether a specific statutory provision or an implicit policy exists that justifies special federal interest in the matter. *Three Rivers* presented the precise situation of a subsidiary issue—the scope of a release—arising in the context of general federal competence. No special interest was found to exist warranting federal intrusion into what was essentially a private transaction based on legitimate expectations that state law would apply. Therefore the court lacked competence to choose the applicable rule and state law should have applied of its own force.

HOWARD STICKLOR

U.S. POSTAL SERVICE STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION (Required by 39 U.S.C. 3685)			
1. TITLE OF PUBLICATION Boston College Industrial & Commercial Law Review			1. DATE OF FILING Sept. 25, 1976
3. FREQUENCY OF ISSUE 6 issues per year	4. NO. OF ISSUES PUBLISHED ANNUALLY 6	5. ANNUAL SUBSCRIPTION PRICE \$10.50	
4. LOCATION OF KNOWN OFFICE OF PUBLICATION (Street, City, County, State and ZIP Code) (Not printers) 885 Centre Street, Newton MA 02159			
5. LOCATION OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS (Not printers)			
6. NAMES AND COMPLETE ADDRESSES OF PUBLISHER, EDITOR, AND MANAGING EDITOR			
PUBLISHER (Name and Address) Boston College Law School Newton, MA 02159			
EDITOR (Name and Address) Professor Mary Ann Glendon Boston College Law School Newton, MA 02159			
MANAGING EDITOR (Name and Address) Dean Richard G. Huber Boston College Law School Newton MA 02159			
7. OWNER (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given.)			
NAME		ADDRESS	
Trustees of Boston College		140 Commonwealth Ave., Chestnut Hill, MA 02161	
8. KNOWN BONDHOLDERS, MORTGAGEES, AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES (If there are none, so state)			
NAME		ADDRESS	
None			
9. FOR COMPLETION BY NONPROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES (Section 132.125, PSN) The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes (Check one)			
☒ HAVE NOT CHANGED DURING PRECEDING 12 MONTHS ☐ HAVE CHANGED DURING PRECEDING 12 MONTHS (If changed, publisher must submit explanation of change with this statement.)			
10. EXTENT AND NATURE OF CIRCULATION	AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS	ACTUAL NO. COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE	
A. TOTAL NO. COPIES PRINTED (Net Press Run)	1500	1500	
B. PAID CIRCULATION 1. SALES THROUGH DEALERS AND CARRIERS, STREET VENDORS AND COUNTER SALES	80	80	
2. MAIL SUBSCRIPTIONS	925	990	
C. TOTAL PAID CIRCULATION (Sum of 10B1 and 10B2)	1005	1070	
D. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES	150	150	
E. TOTAL DISTRIBUTION (Sum of C and D)	1155	1240	
F. COPIES NOT DISTRIBUTED 1. OFFICE USE, LEFT OVER, UNACCOUNTED, SPOILED AFTER PRINTING	345	260	
2. RETURNS FROM NEWS AGENTS	0	0	
G. TOTAL (Sum of E, F1 and 2—should equal net press run shown in A)	1500	1500	
11. I certify that the statements made by me above are correct and complete.	SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER  Richard G. Huber		
12. FOR COMPLETION BY PUBLISHERS MAILING AT THE REGULAR RATES (Section 132.121, Postal Service Manual) 39 U. S. C. 3626 provides in pertinent part: "No person who would have been entitled to mail matter under former section 435B of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates." In accordance with the provisions of this statute, I hereby request permission to mail the publication named in item 1 at the phased postage rates presently authorized by 39 U. S. C. 3626. SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER			