Comments

Federal Common Law and the Need for Uniformity in the Regulation of Federal Savings and Loan Associations and Federal Credit Unions

Federal courts have authority to fashion federal common law in a few narrow instances. Through an examination of relevant precedent in the area of federal common law, this Comment identifies essential factors necessary for the fashioning of federal common law where the rights and duties of the United States are involved. It then applies the findings to the issue of whether state or federal law should govern in actions against officers and directors of federal savings and loan associations and federal credit unions for breach of fiduciary duties or breach of bylaws. This Comment also finds that some federal courts circumvent the limitations imposed on their authority to imply private rights of action by creating such rights under federal common law.

I. Introduction and Summary

Until the landmark decision of *Erie Railroad v. Tompkins*,[1] the federal courts enjoyed broad power to fashion common law. *Erie* curtailed this power significantly but did not eliminate it altogether.

1. 304 U.S. 64 (1938).

As long as the issue raised a federal question that could not be answered by resorting to federal statutes alone, the court was free to devise a federal answer.[2] In the years that followed, the Supreme Court continued to narrow the opportunity of the federal courts to fashion common law by limiting the conditions under which a court is competent to develop law and by limiting the types of rules that can be fashioned.[3] The nature and scope of these limitations have, unfortunately, remained unclear. As a result, federal courts at times formulate rules of decision where they lack the power to do so.

This Comment examines the evolution of federal common law and recent developments in the area of implied private rights of action under federal statutes. It applies the findings to a current issue: whether federal common law or state law should apply in private causes of action against officers and directors of federal savings and loan associations and federal credit unions for breach of fiduciary duties or breach of bylaws. The private causes of action discussed herein are based in part on alleged violations of federal statutes or the regulations[4] promulgated under them which govern the organization, operation, and examination of federal savings and loan associations and federal credit unions.[5] In the main, these actions are

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2. *E.g.*, Board of County Comm'rs v. United States, 308 U.S. 343 (1939); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

3. *See* discussion *infra* part IV.B.

4. The regulations that are alleged to have been violated in these cases were promulgated by either the Federal Home Loan Bank Board (Board) or by the National Credit Union Administration (NCUA), the federal agencies created to give effect to the federal statutes involved, namely the Federal Home Owners' Loan Act of 1933 (HOLA), 12 U.S.C. §1461 (1976) (current version at 12 U.S.C. § 1461 (1988 & Supp. III 1991)) and the Federal Credit Union Act (FCUA), 12 U.S.C. §1751 (1976) (current version at 12 U.S.C. § 1751 (1988 & Supp. III 1991)).

5. In 1989, Congress, in a sweeping effort to resolve the financial crises of federal thrifts, enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989) (to be codified in scattered sections of 12 & 15 U.S.C.). In so doing, Congress abolished the Board, and the Federal Savings and Loans Insurance Corporation (FSLIC), which was supervised by the Board, and allocated the regulatory functions of these agencies to three separate bodies: the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC) and the Federal Home Financing Board (Finance Board). The OTS assumed the Board's chartering and regulatory powers, *see infra* note 114, the FDIC assumed its deposit insurance functions, and the Finance Board assumed its supervisory functions. By means of this restructuring of responsibilities, Congress expected to reduce the conflicts of interest that existed under the previous regulatory scheme. The FIRREA also provided for the creation of the Resolution Trust Corporation (RTC) to manage savings and loan associations for which a conservator or receiver had been appointed. Paul T. Clark et. al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1013, 1023-27 (1990).

The FIRREA amended and repealed several provisions of the HOLA under which the regulations allegedly violated were promulgated; nevertheless, the FIRREA "provides that all orders, resolutions, determinations, and regulations which were issued, made, prescribed, or allowed to become effective by the Bank Board or the FSLIC, and which were in effect on August 9, 1989 [the date the FIRREA was enacted] shall continue in brought to federal district courts under federal question jurisdiction.[6]

Although federal credit unions and federal savings and loan associations are chartered under different federal statutes[7] and are thus subject to different regulations, federal courts faced with questions involving these institutions agree that they "are similar in important respects."[8] Not only are federal credit unions and federal savings and loan associations regulated by federal agencies with comparable powers and obligations, but the legislative histories of the statutes authorizing their creation reveal the same congressional concern for the uniform regulation of their internal administration and operation. Most important for the purposes of this Comment, the federal credit union and savings and loan association cases all raise the same legal issue: whether it is appropriate for federal courts to fashion a federal common law cause of action when the statute's legislative history reveals that Congress was explicit in its concern for uniform regulation but the text of the statute and its history are silent as to the availability of a private right of action. This common issue, more than anything else, explains why courts adjudicating federal credit union disputes often use federal savings and loan association cases as supporting precedent and vice versa.

Part II of this Comment examines the rationale of courts that uphold the fashioning of federal common law in this area and of those that oppose it in favor of applying state law. In general, courts that hold in favor of formulating a federal common law cause of action justify their decisions by pointing to the statute's legislative history

effect according with their terms and shall remain enforceable by or against the Director [of the OTS], the FDIC, the Finance Board, or the RTC, as the case may be, until modified, terminated, set aside, or superseded in accordance with the applicable law." *Id.* at 1027 (citing FIRREA, Pub. L. No. 101-73, § 401(h), 103 Stat. at 357). Thus, the FIRREA instituted primarily organizational changes while leaving the substantive law, that is, the HOLA, the FCUA, and the regulations promulgated under them, largely intact. The FIRREA, however, expanded the power of the Board's successor, the OTS, in certain respects and established a federal standard of gross negligence, 12 U.S.C. § 1821(k) (Supp. III 1991), that applies only in actions brought by the FDIC against officers and directors of federal thrift institutions. *See infra* note 114. For an assessment of how these developments may affect private suits brought by federal savings and loan associations against their former directors, see *infra* part IV.C.

6. The federal courts have jurisdiction in these cases pursuant to article III of the United States Constitution, which grants the courts jurisdiction over all cases arising under the Constitution, laws, and treaties of the United States. 28 U.S.C. § 1331 (1988).

7. *See supra* notes 4-5.

8. Barany v. Buller, 670 F.2d 726, 734 (7th Cir. 1982). *See also* National Alliance of Postal & Fed. Employees v. Nickerson, 424 F. Supp. 323, 325 (D.D.C. 1976) (supervisory powers of the Board analogous to those of the NCUA).

and the need for uniformity in the regulation of federal financial institutions. Courts that reject the use of federal common law insist that the claims raised are traditionally relegated to state law and that the federal courts lack authority to fashion a federal common law cause of action in cases where the statutory scheme is comprehensive enough to evidence congressional intent to bar the creation of additional judicial remedies.

Part III analyzes recent Supreme Court precedents on implied private rights of action, particularly the restrictions imposed by *Touche Ross & Co. v. Redington.*[9] The analysis reveals that in looking for manifestations of congressional intent to create a right of action that is not explicit in the statute, the Court primarily examined the statute's remedial scheme. Because a comprehensive scheme supports the presumption that Congress provided exactly the remedies it deemed appropriate, the Court was unwilling to imply additional rights of action even when doing so would promote the objectives of the legislation. Part III also examines the enforcement provisions of the Federal Home Owner's Act (HOLA), the Federal Institutions Reform, Recovery and Enforcement Act (FIRREA), and the Federal Credit Union Act (FCUA). It finds that they are comparable to the enforcement scheme that the Court found in *Touche Ross* to preclude the fashioning of new remedies. Part III concludes that courts that create new rights of action under federal common law are circumventing the restrictions placed on their authority to imply rights of action.

Part IV reviews the development of federal common law since the time of *Erie*. It focuses on one of the two instances in which federal courts have the power to fashion federal common law, namely when uniquely federal interests are involved. The analysis indicates that not all interests that can be characterized as uniquely federal qualify. Rather, when the rights and duties of the United States are involved, the courts have the authority to fashion law when the development of national, uniform law is required to *protect* the operation of nationwide federal programs or the national treasury. The courts are not justified in fashioning federal common law even when a federal statute may be identified as the source of an asserted right unless the rights and duties of the United States are also affected in the aforementioned respects. Moreover, no authority supports the creation of new rights or new liabilities under federal common law. Applying these findings to the federal savings and loan association and federal credit union cases previously discussed, Part IV concludes that state law should apply.

Lastly, Part V summarizes the prerequisites for fashioning federal

9. 442 U.S. 560 (1979).

common law. It also discusses why federal courts resort to creating federal common law despite the absence of the prerequisites in the given case. This Part encourages the Supreme Court to reconsider its current position and allow the federal courts to fashion private rights of action when such rights are required to further the objectives of congressional acts. It also proposes that when the rights and duties of the United States are involved, federal courts should not have the power to fashion law in favor of the United States without statutory guidance.

II. THE CASES AND THE CONFLICTS

A. *Introduction*

This Part presents a number of federal credit union and federal savings and loan association cases that address the creation of causes of action under federal common law. As will be shown, the majority of courts agree that no express or implied right of action exists under the pertinent federal statutes. The courts reach this decision by examining the language and legislative histories of the statutes to determine whether there is support for either an express or implied right of action. After discerning that no express or implied right of action can be found under the statutes,[10] the courts consider whether one can be fashioned under federal common law. But not all courts that consider this question reach the same conclusion.

B. *Federal Credit Union Cases in Favor of Fashioning Federal Common Law*

In *Barany v. Buller*,[11] the United States Court of Appeals for the Seventh Circuit held that federal law applied in an action brought by elected members of a federal credit union's credit committee who were unlawfully removed from office by the credit union's board of directors.[12] Plaintiffs alleged that the credit union's board had acted without authority, contrary to the removal provisions of the FCUA,

10. Only one court found an implied right of action under the HOLA, City Fed. Sav. and Loan Ass'n v. Crowley, 393 F. Supp. 644 (E.D. Wis. 1975). This case, however, was adjudicated before the strict judicial standard for implications of private rights of action under federal statutes was handed down by the United States Supreme Court. *See* discussion *infra* part III.B.
11. 670 F.2d 726 (7th Cir. 1982).
12. *Id.* at 735.

which empower only the supervisory committee to take such action.[13]

In adjudicating this issue, the *Barany* court first considered plaintiff's assertion that the FCUA provided an implied right of action. Because there was no indication of legislative intent to create a private right of action, none could be implied.[14] But resolution of the issue did not end there. The court went on to discuss why a remedy of the kind sought by plaintiffs was available under federal common law. Although Congress did not intend to provide a private cause of action for the enforcement of the Act's provisions, neither did it intend to deny all federal relief in the matter.[15] Although there is " 'no federal general common law,' "[16] the Supreme Court had authorized the fashioning of "specific" federal common law when " 'uniquely federal interests' " are involved.[17] The court then turned to the Act's legislative history, which revealed the presence of a uniquely federal interest.

By the time the first federal credit union was established in 1934, thirty-eight states had already enacted credit union laws. The credit unions fared well during the economic depression of the 1930s; nevertheless, Congress saw a need for a federal credit union statute. The credit union laws of the various states were not only "inadequate" but, just as important, "the state banking department lacked interest in credit unions."[18] Thus, to protect the public's buying power from usurious money-lending practices and to deal with the consumer credit problems, a "national problem" with no state boundaries,

13. *Id.* at 728. The removal provision, 12 U.S.C. § 1761d (1976), provided: "The supervisory committee . . . may by unanimous vote suspend . . . any member of the credit committee . . . until the next members' meeting, which shall be held not less than seven nor more than fourteen days after any such suspension, at which meeting any such suspension shall be acted upon by the members . . . ." *Barany*, 670 F.2d at 728 n.5.

14. *Barany*, 670 F.2d at 729-31. In a footnote the *Barany* court also noted that in Helskala v. Johnson Space Center Fed. Credit Union, 474 F. Supp. 448, 454 (S.D. Tex. 1979), the court there also held that the FCUA did not support a private right of action in favor of a credit union employee who was fired because she criticized the credit union's management. *Barany*, 670 F.2d at 731 n.8.

15. *Barany*, 670 F.2d at 731. In support of its decision to provide a remedy, the *Barany* court cited Harrington v. Philadelphia City Employees Fed. Credit Union, 243 Pa. Super. 33, 364 A.2d 435 (1976), which also held that a judicial remedy was available. *Barany*, 670 F.2d at 732. In justifying its decision to consider federal common law as a source for the remedy, the court cited Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981), and Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), for the proposition that failure to find an implied cause of action under the Act did not preclude the consideration of federal common law. *Barany*, 670 F.2d at 735-36. See discussion *infra* part III.D. for an analysis of the *Barany* court's decision.

16. *Barany*, 670 F.2d at 731 (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

17. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

18. *Id.* at 733.

Congress enacted the FCUA.[19] In addition to fostering the development of credit unions in states without credit union statutes, the FCUA also established federal jurisdiction for federal credit unions[20] and provided for their uniform administration, an issue of "paramount" importance to Congress.[21] Just as important, the FCUA called for federal credit unions to be governed by a democratically elected board of directors and credit committees, thereby distinguishing them from their state-chartered counterparts.[22]

The *Barany* court also found support in subsequent legislative developments, which increasingly federalized the field by calling on the National Credit Union Association (NCUA) to insure federal credit unions and by giving the agency powers similar to those of the Federal Home Loan Bank Board (Board).[23] The court also relied on the decisions of several other circuit and appellate courts faced with similar issues in the related area of federal savings and loan associations. These courts readily formulated federal remedies not found in the relevant statutes or regulations on the grounds that the need for uniformity in the administration of federal institutions required the application of federal law.[24]

The last issue examined by the *Barany* court was the extent to which the FCUA's remedial provisions preempted the application of federal common law. In so doing, the court recognized the rule established by the Supreme Court:[25] because fashioning new remedies would upset the statute's "integrated system of remedies," federal

19. *Id.*
20. *Id.*
21. *Id.* at 731.
22. *Id.* at 734 ("The salient feature of credit unions is their democratic control and management . . . .") (citation omitted).
23. *Id.*
24. The *Barany* court cited, among other cases, Murphy v. Colonial Fed. Sav. and Loan Ass'n, 388 F.2d 609 (2d Cir. 1967). In *Murphy*, potential directors of a federal savings and loan association brought suit in federal court seeking declaratory judgment that would allow them to inspect the list of eligible voters for directors in the association. Plaintiffs succeeded. With respect to the issue of whether state or federal law applied, Judge Friendly remarked: "'Congress could hardly have intended that the rights of members of federal savings and loan associations to fair election should vary with quirks of law . . . .'" *Barany*, 670 F.2d at 735 (quoting *Murphy*, 388 F.2d at 611-12). The *Barany* court also cited Rettig v. Arlington Heights Fed. Sav. and Loan Ass'n, 405 F. Supp. 819, 826-27 (N.D. Ill. 1975), where the court held that the plenary powers of the Board precluded application of state law in matters involving the internal operation of these institutions. *Barany*, 670 F.2d at 735.
25. The rule was discussed in *Northwest Airlines* and *Texas Industries*. *See infra* text accompanying notes 144-54.

courts should refrain from fashioning additional remedies not intended by Congress.[26] The *Barany* court, however, pointed out that because the remedial scheme set forth by the FCUA did not provide the requested relief, it was not comprehensive enough to evidence a congressional intent to bar the fashioning of additional judicial remedies. Thus, the *Barany* court concluded that a federal common law remedy in the form of a quo warranto proceeding was available to plaintiffs under the federal common law of federal credit unions.[27]

In a more recent decision, *Rosenberg v. AT&T Employees Federal Credit Union*,[28] a federal court again faced the question of whether federal relief is available in a case involving the alleged breach of federal credit union bylaws by its board of directors. Plaintiff contended that the board of directors had failed to adhere to the bylaw provisions for election and had in bad faith thwarted his attempt to obtain a position on the board by cancelling the elections.[29] The *Rosenberg* court agreed with *Barany*'s finding that no express or implied cause of action for violations of the election provisions was available under the FCUA.[30] It also agreed with *Barany* that "the history of the Act reveals that the uniform administration of federal credit unions, which can be achieved only by application of federal law, was of paramount importance to Congress when it enacted the FCUA."[31]

Congress's desire for uniformity in the administration of federal credit unions was further evinced by the fact that it had authorized the NCUA to promulgate the standard bylaws. The court also recognized that this uniformity "would likely be frustrated if state laws were to provide the remedy for a breach of bylaws."[32] Unlike the *Barany* court, the *Rosenberg* court went on to examine the laws of the state in which it sat (New Jersey) to determine the adequacy of the available state law remedy for breach of bylaws. In the process, the court noted that the state's credit union laws had supplanted state common law dealing with credit unions.[33] Thus, it was not clear whether a state remedy was available at all. Moreover, if plaintiff had a remedy, he would be dependent on the State Commissioner of Banking to sue on his behalf.[34] The court concluded that "this

26. *Barany*, 670 F.2d at 736 (citing Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 97 (1981)).
27. *Id.* at 735.
28. 726 F. Supp. 573 (D.N.J. 1989).
29. *Id.* at 575. Plaintiff also alleged that the election provisions had been violated before the election of each of the existing board members. *Id.*
30. *Id.* at 577.
31. *Id.* at 578.
32. *Id.*
33. *Id.*
34. *Id.*

kind of dependency on the peculiarities of the laws of the various states is inconsistent with Congress' interest in uniformity when it created the Federal Credit Union Act."[35]

The court also recognized that plaintiff had no administrative remedy to exhaust that could preclude his seeking judicial relief for his grievance. The NCUA had informed plaintiff that it does not become involved in disputes over the democratic governance of federal credit unions.[36] Plaintiff had either a judicial remedy or none at all. Members of federal credit unions, the court declared, must look to the federal courts to ensure the democratic governance of federal credit unions. However, "[i]f enforcement of those requirements depended upon the vagaries of applying the law of fifty different states, the democratic control intended by Congress might be thwarted."[37] The *Rosenberg* court thus concluded that a federal common law cause of action for breach of bylaws was in order.[38]

C. *Federal Credit Union Cases Against Fashioning Federal Common Law*

Not all courts that have confronted this issue have decided to formulate a federal common law cause of action to redress possible violations of the FCUA or the bylaws promulgated under it. Recently, in *Ridenour v. Andrews Federal Credit Union*,[39] the court denied plaintiff a common law cause of action in a case involving virtually the same provisions of the federal code that were alleged to have been violated in *Barany*.[40] In *Ridenour*, a member of the board of directors and three other supervisory employees alleged that they were unlawfully removed from their positions by the credit union's board of directors.[41]

Although the *Ridenour* court recognized that democratic governance distinguished federal credit unions from other lending institutions, the court, after a review of the statutory provisions, concluded that Congress did not intend to create the asserted cause of action.[42]

35. *Id.*
36. *Id.* at 579.
37. *Id.*
38. *Id.*
39. 897 F.2d 715 (4th Cir. 1990).
40. As in *Barany*, *see supra* note 13 and accompanying text, plaintiffs' claims for damages in *Ridenour* were based on 12 U.S.C. § 1761, which addresses the powers and duties of the credit union's board of directors. *Ridenour*, 897 F.2d at 718-19.
41. *Ridenour*, 897 F.2d at 716-17.
42. *Id.* at 722.

The court noted that Congress had provided a comprehensive remedial structure for officers who had been removed by the NCUA and that this created a "strong negative inference that Congress did not deem the removal of a director by his fellow members on a local credit union's board sufficiently important to warrant creating a federal cause of action."[43] Because Congress had "so recently spoken to the question of credit union employee job protection" and created a new cause of action under limited conditions,[44] the court was "not prepared to find" an implied cause of action for discharge or removal based on other circumstances.[45]

The court then went on to examine the possibility of providing a private cause of action under federal common law and concluded that perhaps the most compelling factor for not formulating a federal common law cause of action is "the NCUA's choice not to give the bylaws that govern removal of board members the authority of agency regulation."[46] Because " '[f]ederal courts lack authority to impose more stringent [standards] under federal common law than those imposed by the agency charged by Congress with administering the comprehensive scheme,' " the *Ridenour* court held that applying federal common law to the case at bar would be inappropriate.[47]

The *Ridenour* court is not the only court to hold against fashioning a federal common law cause of action. In *Montford v. Robins Federal Credit Union*,[48] the court found that the NCUA was the proper body to resolve complaints about possible violations of the regulations controlling the internal operation of federal credit unions.[49] In *Montford*, plaintiff was appointed to the position of loan officer by the credit union's credit committee. She was subsequently discharged from the position by the board of directors for failing to adhere to the credit union's loan policies. Plaintiff, however, contended that she had been terminated because of her efforts to obtain union representation for the credit union's employees.[50]

43. *Id.* at 721.
44. Congress designed the new cause of action to protect federal credit union employees who report violations of law to the NCUA or to the Attorney General. The amendment to the FCUA creating the cause of action was enacted as part of the FIRREA, *see supra* note 5, and is codified at 12 U.S.C. § 1790b (Supp. III 1991).
45. *Ridenour*, 897 F.2d at 721.
46. *Id.* at 722.
47. *Id.* (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 320 (1981)).
48. 691 F. Supp. 347 (M.D. Ga. 1988).
49. *Id.* at 355.
50. *Id.* at 348-50. Plaintiff had previously filed an unfair labor practice claim with the National Labor Relations Board (NLRB). But, after several unsuccessful attempts to obtain a reinstatement and damages through the NLRB and its administrative proceedings, plaintiff finally instigated the suit in United States district court, alleging violations of the FCUA and other claims. *Id.*

The *Montford* court, like the majority of courts that had ruled on this question, found that no implied private right of action existed under the FCUA.[51] In considering the possibility of a federal common law cause of action, the court recognized the similarities between the facts of the case at bar and *Barany*'s. But while the *Montford* court acknowledged the *Barany* court's findings that a federal common law quo warranto proceeding was available to determine a person's right to an office, it stopped short of ruling that such a remedy was available to plaintiff Montford. Instead the court declared that a "*quo warranto* proceeding is available only to prevent the continued exercise of unlawful authority and not to correct what has been done under that authority."[52] Since neither the individual defendants nor the credit union continued to exercise the alleged unlawful authority,[53] the court refused to invoke the common law remedy of a quo warranto proceeding.[54]

Moreover, because plaintiff Montford had failed to state a claim under the FCUA, the court declined to rule on whether defendants had exceeded their authority when they fired her. Such decisions, the court declared, are more properly made by the NCUA.[55] The

51. *Id.* at 351. In addition to finding that a cause of action could not be implied under the FCUA, the *Montford* court held that none could be created under federal common law. It then dismissed the case for lack of subject matter jurisdiction under 28 U.S.C. § 1331 (1988). *Id. Contra* Ridenour v. Andrews Fed. Credit Union, 897 F.2d 715, 719 (4th Cir. 1990) (finding that when "jurisdiction fails because no such federal claim exists, the proper disposition is to dismiss on the merits for failure to state a claim rather than for want of subject matter jurisdiction").

52. *Montford*, 691 F. Supp. at 354. Indeed, in reaching this decision, the *Montford* court cited the second *Barany* appeal, Barany v. Buller (Barany II), 707 F.2d 285 (7th Cir. 1983). Montford, 691 F. Supp. at 353 n.5 In *Barany II*, the Seventh Circuit Court of Appeals affirmed the district court's holding on the issue of damages and instructed it to dismiss plaintiffs' request for injunctive and declaratory relief (to be reinstated to their former credit union posts) as moot because the plaintiffs' terms of office had long since expired and plaintiffs had failed to stand for reelection to preserve the dispute. *Barany II*, 707 F.2d at 286-87. But the court also indicated that even if plaintiffs had run for reelection it would have nevertheless dismissed the claims because the alleged wrongdoers were no longer in office and "the possibility that plaintiffs, even if reelected, would again be faced with a policy disagreement, or would be discharged by the Board of Directors over such disagreement, is a wholly speculative one." *Id.* at 287.

53. Since the filing of the present complaint, plaintiff had been dismissed from her position by both the credit committee that existed at the time of her termination and the present credit committee, the very body that had legal authority under the bylaws to take such action. *Montford*, 691 F. Supp. at 350 n.1. Thus, the alleged unlawful exercise of authority had ceased to exist. *Montford*, 691 F. Supp. at 354.

54. *Id.*

55. *Id.* at 354 n.6.

FCUA's "extensive remedial scheme,"[56] the court stated, "supports the conclusion that Congress intended to give the National Credit Union Administration Board, not federal courts, the authority and power to resolve disputes such as the one presently before this court."[57] In addition, not only is the NCUA "in a better position to interpret the meaning of its own bylaws," but "uniformity and consistency throughout the national credit union system" would also be promoted by requiring credit union employees to submit their complaints directly to the NCUA Board.[58] The court then advised plaintiff to exhaust the administrative remedies available to her. If she remained dissatisfied, she could then seek redress under the FCUA in an appropriate circuit court of appeals.[59]

The existence of the NCUA and its plenary powers to resolve disputes involving a federal credit union provides a court that is reluctant to fashion law with an easy means of disposing of the case before it. Although federal savings and loan associations are regulated by a comparable administrative agency,[60] courts adjudicating disputes in this area have relied on other grounds, such as the traditional state nature of the claim raised, in refusing to fashion law. But as the following section shows, the same rationale that supports the fashioning of federal common law in the federal credit union area, specifically the need for uniform regulation, figures prominently in decisions to fashion federal common law in the area of savings and loan associations.

D. Federal Savings and Loan Association Cases in Favor of Fashioning Federal Common Law

In *Eureka Federal Savings and Loan Ass'n v. Kidwell,*[61] plaintiffs brought an action against former officers and directors for breach of fiduciary duties, violations of federal regulation, and other claims.[62] Defendants contended that no implied right of action could be found under the HOLA, and the court agreed.[63] But rather than dismiss

56. *Id.* at 355. The court described the "elaborate" administrative system that enabled the NCUA to investigate and remedy violations of laws and regulations and noted that Congress had given the NCUA the authority to terminate any officer, director, and committee member upon a showing of wrongdoing in an appropriate hearing. *Id.* at 354-55. *See infra* note 114.

57. *Id.* at 355.

58. *Id.*

59. *Id.* From this it appears that the *Montford* court was completely unaware that the NCUA has repeatedly been unwilling to become involved in disputes over the democratic governance of the credit unions it oversees. *See supra* note 36 and accompanying text.

60. *See supra* note 8 and *infra* note 114.

61. 672 F. Supp. 436 (N.D. Cal. 1987).

62. *Id.* at 437.

63. *Id.* at 439. *Kidwell* was brought in 1987, two years before the FIRREA, *see*

the case, the *Kidwell* court proceeded to examine the question of whether defendants were liable for breach of fiduciary duties under federal common law.

Like the court in *Barany*, the *Kidwell* court held that plaintiff's "complaint raises unique federal interests in the uniform regulation of the federally chartered savings and loan associations that can only properly be protected by the application of a federal rule of decision."[64] The court found support for its position by turning to the language and history of the HOLA. Congress was motivated to enact the statute and its regulatory system by a crisis in the nation's private home financing system that had "developed at least in part as a result of the inconsistent and ill-advised practices of the various states."[65] Congress hoped that the rules promulgated by the Federal Home Loan Bank Board would result in uniform and sound savings and loans association practices. Thus, the statute's history supported the proposition that there is a significant federal interest in uniform regulation of federal financial institutions.[66]

The court found additional support for its decision to establish a

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supra note 5, was enacted. The HOLA, *see supra* note 5, did not provide a private cause of action for breach of fiduciary duties, nor did it establish a standard for adjudication of breach of fiduciary causes of actions whether these actions were brought by private parties or a federal agency. Eureka Savings and Loan Association, nevertheless, sought the formulation of both a private right of action and, conceivably, a favorable federal standard through federal common law. But while the court held in favor of providing a federal common law cause of action, nowhere did it discuss the standard that would be applicable in such an action.

Today, under the FIRREA, both of these issues remain relevant. *See* AmeriFirst Bank v. Bomar, 757 F. Supp. 1365 (S.D. Fla. 1991). Like the HOLA, the FIRREA does not provide a private cause of action for breach of fiduciary duties. However, unlike the HOLA, which made no mention of a federal standard, the FIRREA established the high standard of gross negligence for actions instigated by the FDIC. 12 U.S.C. § 1821(k) (Supp. III 1991). *See infra* note 114. Because this standard does not apply to private parties, but only to the federal government, the question of what is or should be the federal common law standard for private parties pursuing a breach of fiduciary duties cause of action thus remains. The FIRREA gross negligence standard may, nevertheless, affect the willingness of the court to establish a private cause of action under federal common law. The FIRREA standard is also likely to influence the development of the federal common law standard were one to be established in the future. See discussion *infra* part IV.C. of the likelihood that a federal common law private cause of action will continue to be available notwithstanding the FIRREA.

64. *Kidwell*, 672 F. Supp. at 439.

65. *Id.* An examination of current state credit union law would determine whether the practices of the various states continue to be inconsistent or ill-advised. Such a finding may lend support to the view that there is a *current* need for uniformity and thus to the decisions in *Barany*, *Rosenberg*, *Kidwell*, and others, favoring the application of federal common law. Unfortunately, such a examination is beyond the scope of this paper.

66. *Id.*

federal common law cause of action in the " 'plenary authority' " given to the Board to create rules and regulations governing the internal administration of federal savings and loan associations.[67] The court emphasized the significant extent to which the Board's regulations occupied the field and found that the federal regulatory scheme was sufficiently "comprehensive" and "detailed" such that the Board's regulations had "largely, if not in fact completely, preempted the state regulation of federal savings and loan associations."[68] In sum, because only the Board may regulate the internal affairs of federal savings and loans associations, state law was precluded. Moreover, because the fiduciary duties of the associations' officers and directors " 'are matters relating to the internal affairs of these associations, only federal law may be applied to questions involving them.' "[69]

Kidwell is not the only case to hold in favor of creating a federal cause of action for breach of fiduciary duties. In *First Hawaiian Bank v. Alexander,*[70] plaintiff's complaint charged former officers and directors with multiple counts, including state and federal common law breach of fiduciary duties.[71] As did the district court in *Kidwell*, the *First Hawaiian Bank* court dismissed the claims for alleged violations of federal regulations,[72] finding that neither an express or implied cause of action could be found under the HOLA.[73] However, the court found that the issue of whether a private cause of action for breach of fiduciary duties was available under federal common law was "separate and distinct."[74] Although the court recognized that the issue "becomes more clouded"[75] when considering

67. *Id.* (quoting Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta, 458 U.S. 141, 161 (1982)).

68. *Id.* In so doing, the court relied on the Supreme Court's holding in *De La Cuesta*, 458 U.S. at 161-63, which favored federal preemption.

69. *Kidwell*, 672 F. Supp at 440 (quoting Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819, 826 (N.D. Ill. 1975)).

70. 558 F. Supp 1128 (D. Haw. 1983).

71. *Id.* at 1130.

72. *Id.* at 1131. The court also dismissed the cause of action for violation of a similar state regulatory statute. *Id.*

73. *Id.* In reaching this decision, the court examined the HOLA for congressional intent to create a private right of action, but did not end its inquiry there. Following the Supreme Court's lead in Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), the court also examined "the contemporary legal context in which the legislation was amended" to discern whether that context supported an implied right of action. *First Hawaiian Bank*, 558 F. Supp. at 1131. The court found that unlike *Curran*, Congress had not affirmatively considered the existence of a private right of action when amending the HOLA in 1966, partly because there was no case law establishing a private cause of action at that time. Thus Congress, in reviewing and expanding the Board's enforcement powers, had authorized only the extreme remedy of receivership. For these reasons, the court held that no implied right of action was available under the federal statute.

74. *Id.* at 1132.

75. *Id.* at 1131.

the application of federal common law, it decided to follow the path taken by *Barany*, which held that "federal common law remedies are not precluded where the statute's remedies do not afford the aggrieved parties at least a reasonable alternative to the relief sought."[76] Thus the court in *First Hawaiian Bank*, as did the court in *Barany*, opted to fill the interstices of the federal statute by fashioning a federal common law cause of action, reasoning that uniquely federal interests in the uniform administration of federally regulated financial institutions required the application of federal common law.[77] Application of a "single federal standard" was consistent with the underlying purpose of the federal statute.[78]

E. Federal Savings and Loan Association Cases Against Fashioning Federal Common Law

As noted earlier, courts that favor the application of federal common law base their decisions on the need for uniformity in the regulation of the internal affairs of federal financial institutions. One would therefore expect courts opposed to applying federal common law to decline to recognize this need for uniformity. But the controversy is not so clear cut. Courts that have refused to fashion a federal common law cause of action for breach of fiduciary duties have done so even while recognizing that the regulation of federally chartered or insured financial institutions is a uniquely federal interest.

In a recent case, *AmeriFirst Bank v. Bomar*,[79] the court acknowledged that so as "to ensure the safety, soundness and financial integrity of the internal management and administration of savings and loan institutions, Congress has enacted a wide range of regulations governing lending practices, the obligations of managers, and the accounting standards and practices that must be followed in the thrift setting."[80] The court, however, proceeded to find that traditional state law claims, such as breach of fiduciary duties, failed to have "a sufficient nexus to the federal government to warrant the creation of a federal common law cause of action" despite the fact that the claim for breach of fiduciary duties was based in part on violations

76. *Id.* at 1132 (citing *Barany*, 670 F.2d at 736).
77. *Id.* (citing *Barany*, 670 F.2d at 734).
78. *Id.* (citing Rettig v. Arlington Heights Fed. Sav. and Loan Ass'n, 405 F. Supp. 819 (N.D. Ill. 1975)).
79. 757 F. Supp. 1365 (S.D. Fla. 1991).
80. *Id.* at 1373.

of the comprehensive system of federal regulations.[81]

When considering the issue of fashioning federal common law, the court pointed out that the litigation was between private parties and " 'does not touch the rights and duties of the United States.' "[82] Permitting plaintiffs to sue their former officers and directors under state law, moreover, would not "interfere with the successful functioning of the comprehensive federal scheme governing the savings and loan industry or with the protection of the federal insurance fund even though the law of fiduciary duties may vary somewhat from state to state."[83] The court did, however, recognize that the violation of federal regulations would constitute "some evidence that Defendants breached their fiduciary duties under the substantive principles of state law."[84] But given the minimal conflict between the federal interest and state law, the court saw no reason to fashion federal common law.[85]

III. Supreme Court Precedents on Implied Rights of Action Under Federal Statutes

A. Introduction

As previously noted, the majority of courts agree that no express or implied right of action can be found under either the FCUA or the HOLA. In light of this agreement, it might seem unnecessary to review the case law on implied rights of action. Yet the question of whether a right of action can be implied from a federal statute bears greatly upon the broader issue of the appropriateness of fashioning federal common law. Indeed the Supreme Court's shift in approach to implied liability toward a narrower focus on congressional intent has limited the opportunities for courts to judicially imply causes of action. As will be shown, this change in approach may have much to do with the lower courts' willingness to consider federal common law as an alternative means of providing plaintiffs with federal relief, particularly in those cases where no state remedy seems to be available.

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81. *Id.*
82. *Id.* (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 506 (1988) (quoting Bank of Am. Nat'l Trust and Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956))).
83. *Id.* at 1374.
84. *Id.*
85. *Id.*

B. The Cort v. Ash *Test and Its Abandonment in* Touche Ross & Co. v. Redington

In 1975, the Supreme Court in *Cort v. Ash*[86] first outlined the four-factor test for determining whether a private right of action is implicit in federal statutes that do not expressly provide one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[87]

Although the court did not give any indication of the relative significance of the factors, it did indicate that the first factor would control, at least in cases where a literal reading of the statute clearly indicated that Congress had created rights in favor of plaintiff.[88] The Court also seemed to place equal weight on the third factor, citing *J.I. Case Co. v. Borak*[89] for the proposition that " 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.' "[90]

But while *Borak* was not the first case in which the Court created a new right of action to effectuate the purposes of a statute,[91] it represents one of the last instances in which the Court applied the more discretionary and longstanding[92] judicial approach toward implied rights of action. This is because *Borak* and *Cort* soon gave way to a much narrower judicial approach, one that applied strict rules of

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86. 422 U.S. 66 (1975).
87. *Id.* at 78 (footnotes omitted).
88. The Court stated: "True, in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling." *Id.* at 82.
89. 377 U.S. 426 (1964).
90. *Cort*, 422 U.S. at 84 (quoting *Borak*, 377 U.S. at 433).
91. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375 n.54 (1982), Justice Stevens traced the broader approach exemplified in *Borak* back to Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). He also traced the " 'indisputable rule that where there is a legal right, there is also a legal remedy,' " back to Marbury v. Madison, 1 Cranch 137, 163 (1803).
92. Thus, Professor Ashford writes: "[T]he antecedent analysis has been an important factor in the Supreme Court's determination of implied liability under federal statutes in a long line of cases spanning over half a century." Robert H. A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to* Borak, 79 NW. U.L. REV. 227, 233 (1984).

statutory construction to determine whether Congress intended to create the requested right of action.

The Court introduced this new approach in *Touche Ross & Co. v. Redington*,[93] wherein it examined the question of whether customers of a brokerage firm had an implied cause of action for damages against the brokerage firm's accounting company. Plaintiffs alleged that the accounting company, Touche Ross, had improperly audited and certified false financial reports for submission to the Securities and Exchange Commission (SEC) in violation of section 17(a) of the Securities Exchange Act of 1934 (SEA).[94] The accounting firm had thus prevented the brokerage firm's true financial condition from becoming known in time for customers to take action to forestall liquidation or lessen their financial damage.[95]

The Supreme Court's answer to plaintiff's request that it recognize an implied cause of action was unequivocally negative. Quoting *Cannon v. University of Chicago*,[96] the Court declared: " 'The fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' "[97] The analysis involves the interpretation of a statute and consequently "must begin with the language of the statute itself."[98] The Court concluded that while the intent of the statute is to give the SEC sufficient warning to take action to protect investors before the brokerage firm's collapse, "[section] 17(a) does not by any stretch of its language purport to confer private damages rights or, indeed, any remedy in the event the regulatory authorities are unsuccessful in achieving their objectives and the broker becomes insolvent

93. 442 U.S. 560 (1979)

94. The relevant version was 5 U.S.C. § 78q(a) (1970). *Touche Ross*, 442 U.S. at 562 n.2.

95. *Touche Ross*, 442 U.S. at 565-66. The district court held that §17(a), 15 U.S.C. § 78q(a) (1976), was "a bookkeeping provision. By its terms, it . . . did not 'create rights in anybody.'" *Touche Ross*, 442 U.S. at 566 n.8 (quoting Redington v. Touche Ross & Co., 428 F. Supp. 483, 489, 491 (S.D.N.Y. 1977)). In contrast, § 18(a) of the 1934 Act, 15 U.S.C. § 78r(a) (1976), did create an express right of action in favor of persons who had bought or sold stock which had been affected by the report while relying on the report's validity. Because Congress had provided an express right of action, the district court concluded that Congress intended that § 18(a) be the exclusive remedy for § 17(a) violations. *Touche Ross*, 442 U.S. at 567 n.8. The court of appeals, however, reversed. Because, in its view "it was plain that broker's customers were the 'favored wards' of § 17(a), it could not agree that 'Congress simultaneously sought to protect a class and deprived the class [by virtue of § 18's limiting language] of the means of protection.'" *Id.* at 567 n.9 (quoting Redington v. Touche Ross & Co., 592 F.2d 617, 623 (2d Cir. 1978)) (alteration in original). The Supreme Court, however, reversed, stating that the Court's task was "limited solely to determining whether Congress intended to create the private right of action asserted." *Id.* at 568.

96. 441 U.S. 677 (1979).

97. *Touche Ross*, 442 U.S. at 568 (quoting Cannon v. University of Chicago, 441 U.S. 677, 688 (1979).

98. *Id.*

before corrective steps can be taken."[99] The Court further examined the terms of section 17(a) and noted that they were "forward-looking, not retrospective; it seeks to forestall insolvency, not to provide recompense after it has occurred."[100] Thus, the language of the statute did not support the finding that an implied cause of action lay in favor of anyone.[101]

The Supreme Court went on to find further support for its conclusion in the statute's remedial scheme. Section 17(a) was flanked by provisions that explicitly provided for private rights of action. This showed that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."[102] The Court also cited evidence in support of the position that Congress had intended another section to provide an exclusive remedy.[103] In the end, however, when faced with the contention that an implied private right of action was necessary to effectuate the purposes of section 17(a), the Court revealed its new and highly limiting approach.

While recognizing that *Cort* set forth four factors, one of which concerned the goal of effectuating Congress's purpose in enacting the statute, the Court declared that not all of the factors are equally significant. "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."[104] Thus, even though the purpose of section 17(a) was to protect customers from the very kind of false financial reporting alleged in the case, and despite the fact that the SEC had successfully instigated suits barring the brokerage firms and five of its officers from conducting business because of their violations of the SEA,[105] the Court concluded that here "the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful."[106]

With respect to plaintiff's contention that the Court had in *Borak* previously found an implied cause of action under another provision of the SEA, in part so as to effectuate the purpose of the statute, the Court responded that "it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of

99. *Id.* at 570-71.
100. *Id.*
101. *Id.* at 571.
102. *Id.* at 572.
103. *Id.* at 573-74.
104. *Id.* at 575.
105. *Id.* at 564.
106. *Id.* at 576.

private causes of action, and we follow that stricter standard today."[107] In short, the Court showed itself to be entirely reluctant to provide a cause of action that was "significantly broader" than the remedy Congress had expressly provided because "the ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."[108] For these reasons, "it is not for us to fill any *hiatus* Congress had left in this area,"[109] and so "at least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative."[110]

Thus, the Court in *Touche Ross* focused on the question of congressional intent, the second *Cort* factor, almost to the exclusion of the others. It did not find the fact that plaintiffs belonged to the class of persons for whose protection the statute was enacted persuasive, the first *Cort* factor.[111] Nor did the Court give any weight to the proposition that recognition of the right was necessary to effectuate the goals of the statute, the third *Cort* factor. It also barely addressed the issue of the statute's enforcement as matter of federal, not state concern, the fourth factor. Instead the Court concentrated on uncovering the intent of Congress by examining the statute's text, legislative history, and most of all, the statute's enforcement scheme. Indeed, the Court in *Touche Ross* based its decision not to grant the requested implied liability primarily on the nature and scope of the SEA's enforcement scheme.

Touche Ross is described in detail here to exemplify the radical shift that took place between 1975 and 1979 in the Court's willingness to find implied rights of action under federal statutes. But beyond this, as will be shown below, the enforcement provisions of the statutes involved in the credit union and savings and loan association cases, namely the HOLA-FIRREA and the FCUA,[112] are quite similar to the SEA's enforcement scheme in precisely those respects that the Supreme Court in *Touche Ross* found decisive in denying an implied right of action. These parallels raise interesting questions regarding the appropriateness of fashioning a federal common law private right of action where an implied right of action could not be obtained through the application of the strict *Touche Ross* standard.

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107. *Id.* at 578.
108. *Id.*
109. *Id.* at 579 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).
110. *Id.* at 576.
111. The Court declared: "Certainly the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf." *Id.* at 578.
112. *See supra* notes 4-5 and accompanying text.

C. A Comparison of the Enforcement Provisions of the HOLA-FIRREA, the FCUA, and the SEA

To begin with, the HOLA, the FCUA, and the SEA were all enacted during and spurred by the problems of the Great Depression.[113] All three statutes provide for the creation of federal agencies that promulgate regulations for and oversee the financial integrity of their respective institutions. The statutes' enforcement schemes, which empower the agencies to take action against violators, are also comparable in orientation and scope. They are "forward-looking,"[114]

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113. The HOLA was enacted in 1933; the FCUA and the SEA were passed in 1934.

114. Compare the HOLA's and the FCUA's regulatory scheme set forth respectively in 12 U.S.C. § 1730 (1988), *repealed in part by* FIRREA, Pub. L. No. 101-73, § 407, 103 Stat. 363 (1989), and 12 U.S.C. § 1786 (1988 & Supp. 1991) with the SEA's enforcement provisions contained in 15 U.S.C. § 78 (1988 & Supp. 1991). The HOLA, 12 U.S.C. § 1730, allowed the Board to issue cease and desist orders, *id.* §§ 1730(e), (f); to suspend or remove directors and officers, *id.* §§ 1730(g), (h); to pursue judicial enforcement of its orders, *id.* § 1730(k)(2); and to impose civil sanctions, *id.* §§ 1730(k)(3)(A), (P). The FCUA, 12 U.S.C. § 1786, authorizes the NCUA to inquire into violations of law, rules or regulations, and unsound practices, *id.* § 1786(e)(1); to issue cease and desist orders, *id.* §§ 1786(e)(1), (2); to remove directors, officers, or committee members, *id.* §§ 1786(g), (i); to take control of wayward institutions, *id.* § 1786(h); to pursue judicial enforcement of its orders and to impose civil sanctions, *id.* § 1786(k)(2)(A). The SEA, 15 U.S.C. §§ 78a-78z, authorizes the Commission to investigate and enjoin violations, *id.* § 78u; to suspend or revoke the registration of self-regulatory organizations for failure to comply with SEC regulations, *id.* § 78s(h); to suspend or revoke the registration of any broker for submitting false or misleading statements, *id.* § 78o(b)(4); to seek judicial enforcement of its orders and to impose civil penalties, *id.* § 78u-1.

The FIRREA amendments to the HOLA's enforcement scheme expand the HOLA's prospective provisions. The FIRREA authorizes the OTS, *see supra* note 5, to impose higher civil penalties against an association's officers and directors as well as any institution-affiliated party for certain kinds of wrongdoing, including breach of fiduciary duties. 12 U.S.C. § 1818(i)(2)(C) (Supp. III 1991). The FIRREA also institutes a new retrospective provision: the Board's replacement, the OTS, now has the authority to proceed against former officers and directors (the HOLA allowed action to be taken against current officers only) as long as notice of the action is served within six years of their departure from the association. 12 U.S.C. § 1818(i)(3) (Supp. III 1991). FIRREA also authorizes the FDIC to bring civil actions against directors and officers in which they could be held personally liable for gross negligence or for "conduct that demonstrates a greater disregard of a duty of care," such as willful tortious acts. 12 U.S.C. § 1821(k) (Supp. III 1991).

Moreover, recently, on September 19, 1991, a United States district court narrowly construed § 1821(k). The court held that § 1821(k)'s standard of gross negligence precludes the FDIC from suing former directors for breach of fiduciary duties under state law because the action required a showing of only simple negligence. FDIC v. Swager, 773 F. Supp. 1244, 1248 (D. Minn. 1991). It held so despite the last sentence in 12 U.S.C. § 1821(k), which states that "[n]othing in this paragraph shall impair or affect any right of the Corporation [the FDIC] under other applicable law." It would therefore be difficult to argue that the FIRREA amendments have altered the HOLA's remedial emphasizing prospective rather than retrospective remedies. This is to say that they are all oriented toward preventing injury rather than providing recompense after injury has occurred.[115] The enforcement schemes in the HOLA, the FCUA, and the SEA are also alike in another important respect: they contain provisions for private rights of action in a few limited circumstances,[116] though none for the violations for which plaintiffs sued in *Touche Ross*, the credit union cases, or the savings and loan association cases discussed earlier.[117]

Admittedly, the regulations allegedly violated in *Touche Ross*, the federal credit union cases, and the savings and loan association cases all address different concerns. In *Touche Ross*, the regulations dealt with keeping records and filing financial reports with a government regulatory body. In the savings and loan association cases, the regulations involved the institutions' lending practices, while in the federal credit union cases, the regulations provided for the democratic governance of federal credit unions. Nevertheless, in all these cases,

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framework from a forward-looking to a backward-looking scheme, especially if courts continue to limit the FDIC to actions requiring gross negligence or worse. In any event, while the FIRREA's remedial framework provides some retrospective remedies that the HOLA lacked, the majority of the enforcement provisions are still directed toward preventing insolvency, not toward providing relief after such insolvency has occurred.

115. Indeed, courts that have refused to fashion a federal common law cause of action in the savings and loan association cases have characterized the HOLA's enforcement scheme as "forward-looking" and have based their decision not to grant the right of action in part on this finding. *E.g.*, FSLIC v. Capozzi, 855 F.2d 1319, 1325 (8th Cir.1987), *vacated on other grounds*, 490 U.S. 1062 (1989).

116. The FCUA provides two private rights of action. Officers and directors of federal credit unions who are removed from office by the NCUA can petition the appropriate United States district court to stay the orders. 12 U.S.C. § 1786 (g)(6) (1988 & Supp. 1991). They are also entitled to judicial review of the NCUA Board's rulings. *Id.* §1786 (j)(2). The FIRREA also amended the FCUA to provide another cause of action for whistleblowing, 12 U.S.C. § 1790b (1988 & Supp. III 1991). *See supra* note 44 and accompanying text. With respect to federal savings and loan associations, the HOLA-FIRREA provides two express private rights of action. One is identical to the aforementioned FCUA provision that allows removed officers and directors of savings and loan associations to pursue an administrative hearing and judicial review of the administrative court's decision. 12 U.S.C. § 1464(d) (1988 & Supp. 1991). The other, enacted in 1982, allows private parties to obtain redress from the association for certain unfair lending practices. 12 U.S.C. § 1464(q) (1988). The provisions for express private rights of action under the SEA to which the Court referred in *Touche Ross*, 442 U.S. at 572, namely 15 U.S.C. §§ 78p(b), 78r(a), and 78t, provide private rights of action in a number of different circumstances. Section 78p(b) allows issuers to recover from beneficial owners of equity securities any profits derived from their sale and purchase. Section 78r(a) allows customers who purchased or sold securities in reliance on § 17(a) reports to recover losses incurred as a result of false or misleading statements contained in the reports. And finally § 78t makes jointly and severally liable "[e]very person who, directly or indirectly, controls any person liable under any provision."

117. Thus, if Congress demonstrated in the SEA that it knew how to fashion a private right of action when it wished to provide one, then Congress certainly exhibited the same capacities in the FCUA and the FIRREA.

plaintiffs faced the same legal predicament: "forward-looking" enforcement schemes that provide express rights of action in some circumstances but which were mute on the availability of private rights of action for the particular regulatory violations asserted. Moreover, in all cases the "forward-looking" regulations failed to prevent the damage for which plaintiff instigated suit, a problem which the Supreme Court in *Touche Ross* did not find compelling.

Plaintiffs in the federal credit union cases and the savings and loan association cases presented earlier thus stood on similar footing as plaintiffs in *Touche Ross* with respect to the possibility of obtaining redress for the damage incurred as a result of the violation of the federal statutes.[118] Plaintiffs in *Touche Ross* were unsuccessful in their attempt precisely because the SEA's enforcement scheme supported the presumption that the remedies Congress had provided were exclusive. Thus, one would expect that the same conclusion would hold in the federal credit union and savings and loan association cases. And indeed, plaintiffs in these cases were denied implied private rights of action.

However, some lower federal courts did not end the inquiry there, as the Court in *Touche Ross* directed, but instead provided plaintiffs with a cause of action under federal common law. Their decision to do so is all the more surprising in light of the similarity in enforcement schemes between the SEA, the FCUA, and the HOLA described above and the strong message delivered by the Court in *Touche Ross* against judicially created rights of action. In short, it appears that those courts which turned to federal common law to provide the relief sought by plaintiffs were in effect circumventing the limitations the Supreme Court had placed upon their authority to fashion law.

In *Barany v. Buller*,[119] however, the court cited several Supreme Court cases to support the proposition that the failure to find an implied cause of action under the statute did not preclude the consideration of federal common law as a remedial source. Therefore, before determining whether the lower federal courts in *Barany*, *Rosenberg*

118. Indeed, it appears that plaintiffs in federal credit union cases were worse off than plaintiffs in the savings and loan association cases, as the NCUA refused to become involved in their governance disputes. *See supra* text accompanying note 36. One reason why the NCUA may have chosen not to become involved is because the bylaws allegedly violated in these cases did not impact the financial integrity of the thrift. If so, this fact should influence a court's decision whether to fashion federal common law. *See* discussion *infra* part IV.D.

119. 670 F.2d 726 (7th Cir. 1982).

v. AT&T Employees Federal Credit Union,[120] *Eureka Federal Savings and Loan Association v. Kidwell,*[121] and *First Hawaiian Bank v. Alexander*[122] all overstepped their authority in providing relief under federal common law, one must consider whether the Supreme Court cases cited by these courts as supporting precedent substantiate their decisions.

D. *Relevant Supreme Court Precedents on the Consideration of Federal Common Law as an Alternative Source for the Remedy Sought by Plaintiff*

In support of its decision to consider formulating a federal common law cause of action when none could be implied under the FCUA, the *Barany* court cited *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*[123] for the proposition that a court can consider alternative sources for federal remedies.[124] In *Middlesex County*, the Court found that no private right of action could be implied under either one of the pertinent federal acts.[125] Yet, as the *Barany* court noted, the Court then considered sua sponte the possibility of providing the requested relief under a different federal statute.[126] In *Middlesex County*, however, the Court did not consider whether federal common law could provide the remedy or give any indication that such consideration would be justified.[127]

120. 726 F. Supp. 573 (D.N.J. 1989).
121. 672 F. Supp. 436 (N.D. Cal. 1987).
122. 558 F. Supp. 1128 (D. Haw. 1983).
123. 453 U.S. 1 (1981).
124. *Barany*, 670 F. 2d at 731.
125. *Middlesex County*, 453 U.S. at 17-18. The pertinent federal acts were the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 (1976 & Supp. III 1979), and the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. § 1401 (1976 & Supp. III 1979). *Middlesex County*, 453 U.S. at 4.
126. *Barany*, 670 F.2d at 731. The statute under consideration by the Court was 42 U.S.C. § 1983 (1976). *Middlesex County*, 453 U.S. at 19.
127. On the contrary, it clearly demonstrated its reluctance to provide any additional avenues for enforcement beyond those expressly contemplated in the statutes by denying plaintiffs' cause of action under 42 U.S.C. § 1983 despite the fact that both the FWPCA and the MPRSA contained "saving clauses" which indicated Congressional intent to preserve any rights plaintiffs may have under "any statute or common law." *Middlesex County*, 453 U.S. at 9. The Court reasoned that the comprehensive nature of both the FWPCA and the MPRSA enforcement schemes made it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies. . . ." *Id.* at 20. In his dissent, Justice Stevens adamantly rejected the majority's notion that the saving clause did not evidence congressional intent to preserve § 1983 remedies and read the saving clause so as to include §1983: "Respondent's right to proceed under § 1983 in light of these statutory provisions could have been made more plain only had Congress substituted the citation '42 U.S.C. § 1983' for the words 'any statute' in the saving clauses." *Id.* at 29 (Stevens, J., dissenting). In addition, he also gave considerably more weight than did the majority to the Senate and House reports as indicating Congress's intentions with respect to the saving clauses:

The legislative history of both statutes makes it clear that the saving clauses

Thus, while *Middlesex County* may be viewed as allowing a court to consider other legislative acts when determining whether a remedy is available, it does not support the notion that judicially created federal common law may also be considered when there is no implied right of action.

The *Barany* court also cited *Northwest Airlines v. Transport Workers Union of America*[128] and *Texas Industries, Inc. v. Radcliff Materials, Inc.*[129] in support of its decision to consider federal common law.[130] In so doing, the *Barany* court pointed out that in those cases the Supreme Court considered federal common law as a source of federal remedy.[131] The *Barany* court then concluded that while the Court had ultimately refused to fashion law, its rationale was not applicable to the case before it.[132] Both *Northwest Airlines v. Transport Workers Union of America* and *Texas Industries, Inc. v. Radcliff Materials, Inc.* were distinguishable. Whereas the common law did not provide the right to contribution[133] sought by plaintiffs in both *Northwest Airlines* and *Texas Industries*, in the instant case "the common law does provide the asserted remedy in a *quo warranto* proceeding."[134] In addition, "conflicting policy arguments regarding recognition of the asserted contribution remedy" had been raised in *Northwest Airlines* and *Texas Industries*, while in *Barany* "the only question is which law—state or federal—provides the asserted remedy, not whether the remedy should exist at all."[135]

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were intended to mean what they say. The Senate Report on the Clear Water Act states:

> "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages."
>
> . . . .
>
> And the corresponding report on the MPRSA similarly states that the authorization of citizen suits shall not restrict or supersede "any other right to legal action which is afforded the potential litigant in any other statute or the common law."

Id. at 29-30 (citations omitted).

128. 451 U.S. 77 (1981).
129. 451 U.S. 630 (1981).
130. *Barany*, 670 F.2d at 731 n.9.
131. *Id.*
132. *Id.*
133. "A right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines*, 451 U.S. at 87-88.
134. *Barany*, 670 F.2d at 731 n.9.
135. *Id.*

A close reading of both *Northwest Airlines* and *Texas Industries*, however, reveals that the notion that the common law does not provide a contribution remedy was not dispositive in either case.[136] In addition, the Court in *Northwest Airlines* weighed the conflicting policy arguments[137] not to determine whether the right to contribution existed under the statute,[138] but to point out that the federal courts should refrain from altering " 'the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.' "[139] The Court's refusal to grant the right was not based on the policy conflict, as suggested in *Barany*. Rather the Court emphasized the policy conflict to remind the lower federal courts of the limited role they play in our system of jurisprudence, particularly in providing relief where federal statutes are implicated.[140]

The *Barany* court also distinguished *Northwest Airlines* and *Texas Industries* on the grounds that the enforcement provision contained in the FCUA and the HOLA were not as comprehensive as those analyzed in *Northwest Airlines* and *Texas Industries*.[141] Yet in both *Northwest Airlines* and *Texas Industries*, the Court applied

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136. The Supreme Court actually noted that while a right to contribution was not originally part of the common law, the rule has been abrogated by most states. *Northwest Airlines*, 451 U.S. at 86-87. With respect to a federal right to contribution, the Court acknowledged that while there was also no initial right to contribution under federal law, the modern trend among the lower federal courts was to recognize the right. *Id.* at 84 n.10. Later on, however, the Court asserted that it itself had never found such a right. *Id.* at 96-97.

137. Here, petitioner Northwest Airlines asserted a right to contribution under the same federal statutes it had been found to have violated in a previous case, namely the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976) or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976). *Northwest Airlines*, 451 U.S. at 79 nn.1 & 2. Petitioner sought contribution from the union representing its employees that had allegedly been at least partially responsible for the statutory violations. *Northwest Airlines*, 451 U.S. at 82. The policy arguments addressed the question of whether the recognition of a right to contribution would serve the purposes of the acts and promote its underlying policies. *Id.* at 89.

138. In fact, the court approached the problem assuming that all the elements of a contribution claim were established, including the assumption that the statute's policy considerations supported the recognition of the right. *Id.* at 89-90.

139. *Id.* at 98 (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)).

140. Thus the Court declared:

> In this case, . . . a favorable reaction to the equitable considerations supporting petitioner's contribution claim is *not a sufficient reason* for enlarging on the remedial provisions contained in these carefully considered statutes.
>
> Whatever may be a federal court's power to fashion remedies in other areas of the law, we are satisfied that it would be improper for us to add a right to contribution to the statutory rights that Congress created in the Equal Pay Act and Title VII.

Id. at 98 (footnotes omitted) (emphasis added).

141. *Barany*, 670 F.2d at 736. The *First Hawaiian Bank* court also alluded to this when it pointed out that "the HOLA's remedial scheme does not provide the kind of remedy requested by the plaintiff." First Hawaiian Bank v. Alexander, 558 F. Supp. 1128, 1132 (1983).

the four-factor *Cort* test[142] and refused to recognize the right to contribution because the "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies."[143] In the final analysis, the same factors that led the court to deny the claim for an implied cause of action in *Touche Ross* also compelled the Court to deny the implication of a right to contribution in both *Northwest Airlines* and *Texas Industries.*

The Court was also equally clear in denying a right to contribution under federal common law in both *Northwest Airlines* and *Texas Industries.* In *Northwest Airlines*, the Court recognized that the federal courts have, in the absence of legislation, a "responsibility . . . to fashion federal common law in cases raising issues of uniquely federal concern."[144] Nonetheless, the authority to interpret a statute is "fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."[145] One should also note that the Court in *Northwest Airlines* did not declare outright that it lacked the power to fashion the remedy requested. This was to come in *Texas Industries*, where the Court approached the issue of the right to contribution in terms of "can" rather than "should."

The Court in *Texas Industries*[146] determined that the dispositive question was "whether courts have the *power* to create such a cause of action absent legislation, and if so, whether that authority should be exercised in this context."[147] But the Court never reached the second part of the question as it answered the first in the negative. In so doing, the Court attempted to define the lawmaking powers of the

142. *Northwest Airlines*, 451 U.S. at 91-94; *Texas Industries*, 451 U.S. at 639-40.

143. *Northwest Airlines*, 451 U.S. at 93-94. In *Texas Industries*, the Court noted: "It does not necessarily follow, however, that Congress intended to give the courts as wide discretion in formulating remedies to enforce the provisions of the Sherman Act or the kind of relief sought through contribution." *Texas Industries*, 451 U.S. at 643.

144. *Northwest Airlines*, 451 U.S. at 95.

145. *Id.* at 97. The Court furthermore stated that unlike their state counterparts, the federal courts are courts of limited jurisdiction with limited lawmaking powers, a power which is "vested in the legislative, not the judicial, branch of government . . . ." *Id.* at 95. Hence, "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Id.* at 95 n.34.

146. Plaintiffs in *Texas Industries* had been found liable for violating the antitrust laws and sought a right to contribution from the other participants in the unlawful conspiracy. *Texas Industries*, 451 U.S. at 632-33.

147. *Id.* at 638 (emphasis added).

federal courts.[148] The federal courts, it noted, could fashion federal common law, but only in a " 'few and restricted' "[149] instances: where it was " 'necessary to protect uniquely federal interests' "[150] and where Congress had "given the courts the power to develop substantive law."[151] *Texas Industries* fell under the second category. In this regard the Court noted that it had previously construed the first two sections of the Sherman Act, the act in question in the case, as granting the federal courts the power to develop substantive law. But this was not to say that the Court had the power to grant the relief requested. Congress had given the federal courts the authority to define violations of the antitrust acts, but it had not "intended to give courts as wide discretion in formulating remedies."[152] This was evident from the "detailed and specific"[153] remedial provisions of both the Sherman and Clayton Acts, which contrasted with the broad, sweeping language of the first two sections of the Sherman Act. Thus, once again, this time in the context of considering the availability of a federal common law right to contribution, the Court refused to broaden an act's remedial scheme, noting that " '[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress had enacted a comprehensive legislative scheme.' "[154]

E. Preliminary Conclusions

While the Court in both *Northwest Airlines* and *Texas Industries* considered the possibility of fashioning the federal common law cause of action requested by plaintiff, in neither case did it proceed to fashion one. Most important, the Court refused to create the cause of action under federal common law for the very same reason it refused to find one implicit in the relevant federal statutes: the statutes in question provided a comprehensive scheme of enforcement that reflected Congress's intent to exclude all other remedies.

148. As most commentators have pointed out, the scope of the federal courts' lawmaking powers is quite nebulous. See MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 79 (1980), where Professor Redish writes: "At no time has the Supreme Court definitively explained either the principles which determine when courts should resort to federal common law or the specific categories of situations to which federal common law will apply." Although Professor Redish made this statement in 1980, the problems in defining the extent of the federal court's authority to develop common law remain to this day. For other views, see *infra* note 160.

149. *Texas Industries*, 451 U.S. at 640 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

150. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

151. *Id.* (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).

152. *Id.* at 643.

153. *Id.* at 644.

154. *Id.* at 645 (quoting *Northwest Airlines*, 451 U.S. at 97).

In this respect, the Court could not have made its reasoning more clear: the judiciary should not interfere with the delicate balance of interests embodied in the scheme by broadening it to include private rights of action that Congress presumably considered and rejected, even when doing so would promote the purposes of the statute and thus improve on the statutory scheme. The federal courts' primary function is to apply the law, not to make it. This, in short, constitutes the Supreme Court's current view on the subject of judicially created rights of action whether the right of action is to be implied from the statute or created under federal common law.

From this vantage point, the decision of the *Barany* court and its progeny to consider federal common law seems misguided. Indeed, it appears that the comprehensiveness of a particular statute's remedial scheme is just as dispositive when considering the formulation of a new cause of action under federal common law as it is when considering whether one should be implied from a statute. This finding further supports the proposition that the courts in *Barany*, *Rosenberg*, *First Hawaiian Bank*, and *Kidwell* may all have overstepped their authority in formulating a cause of action under federal common law where none could be implied from the statute because of the comprehensive nature of the statute's remedial scheme.

Yet it should also be pointed out that in both *Northwest Airlines* and *Texas Industries*, the Court derived its authority to fashion law from the second category of instances that authorizes the formulation of federal common law: a grant of Congress to develop substantive law. Moreover, the Court construed those grants as delimiting its competence to develop substantive law in the area of remedies. This point did not go unnoticed by the court in *Barany*. In support of its decision to fashion federal common law, the *Barany* court indicated that in contrast to *Texas Industries*, in which no unique federal interest was implicated, in the case before it a unique federal interest in the uniform regulation of federal financial institutions was evident from the statute's legislative history.[155] Thus, before concluding that the *Barany* court and its progeny should have refrained from turning to federal common law as an alternative source for the asserted right, one must answer two questions. First, does the regulation of the internal affairs of federal credit unions and savings and loan associations represent a uniquely federal interest justifying the fashioning of federal common law? Second, what limits, if any, has

155. *Barany*, 670 F.2d 736 n.21.

the Supreme Court placed on the federal courts' lawmaking powers when uniquely federal interests are involved?

IV. Uniquely Federal Interests and the Authority of Federal Courts to Fashion Federal Common Law

A. Introduction

As noted earlier, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[156] the Court declared that absent congressional authority, federal courts could fashion federal common law in two limited instances: "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,'[157] . . . and those in which Congress has given the courts the power to develop substantive law."[158] The Court further defined the category of uniquely federal interests as constituting "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[159] Yet apart from connecting the concept of uniquely federal interests to that of national sovereignty, the Supreme Court did little else to define the rights and obligations of the United States and thus the meaning of uniquely federal interests. Indeed, it appears that the Court has never clearly defined the conditions under which the rights and duties of the United States are affected. Consequently, lower federal courts have been unable to ascertain when they have the authority to fashion federal common law. This explains why the competence of federal courts to formulate rules of decision continues to be the subject of heated debate among commentators of the law and the lower federal courts alike.[160]

156. 451 U.S. 630 (1981).

157. *Id.* at 640 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

158. *Id.* (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).

159. *Id.* at 641 (footnotes omitted).

160. For example, Professor Martha A. Field writes that "no meaningful limits to make federal common law have been articulated or adopted, and that the bounds of federal common law are potentially much broader than is generally supposed." Martha A. Field, *Sources of the Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 884 (1986). Professor Field goes on to contend that the current approach gives the courts broad powers to make federal common law, contrary to the traditional view that courts are competent to formulate law only in certain areas. *Id.* at 886-88. But while Professor Field attacks the traditional position, stating that "[c]ommentators typically simply list areas in which federal common law is acceptable without providing any animating principle to unify the categories," *id.* at 886 (footnote omitted), she later notes that "[i]nstead, the central issue in all cases is the degree of federal need for a federal rule, and the degree to which that rule would impinge upon state interests," *id.* at 888. As will be shown, this Comment agrees with Professor Field in that the formulation of

This Part will focus on a number of the most pertinent[161] Supreme Court decisions to examine the nature of uniquely federal interests with respect to the rights and duties of the United States. The findings will then be applied to determine whether the uniform regulation of federal financial institutions constitutes a uniquely federal

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federal common law does not depend on whether the federal interests involved may be substantively categorized as a type of interest justifying lawmaking, but submits that the critical question is whether there is a federal interest in need of *protection*, *see infra* part IV.C.

P. Bator, P. Mission, D. Shapiro, and H. Wechsler also write that after Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the substantive limits of federal common law were unknown because the doctrine applied in "a wide area of general, unwritten commercial law, marked off only with difficulty from property and other matters of 'local law.'" PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 700 (2d ed. 1973). And as recently as 1989, Professor Louise Weinberg noted: "I take it that there are no fundamental constraints on the fashioning of federal rules of decision. I will call this 'the true position.'" Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989). Professor Weinberg later indicates, however, that "'the official position'" is that federal common law can be fashioned "only in a few discrete, narrow areas, where uniquely federal interests are at stake." *Id.* at 807-08 (footnote omitted). Her proposition is that the limitations placed on federal judge-made law are wrong. *Id.* at 806. They are wrong because "the lawmaking power of a sovereign is co-extensive with its sphere of governmental interest," and "[t]he judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon. Without this principle we cease to be a nation of laws." *Id.* at 813.

161. This Comment is primarily concerned with the development of federal common law based on federal statutes. It will not examine federal common law that derives from the Constitution because the authority and proclivity of the federal courts to formulate federal common law may differ depending on whether the Constitution or a federal statute is involved. For example, the Supreme Court seems more willing to fashion new private rights of action when the source of the right is the Constitution rather than a federal statute. In Davis v. Passman, 442 U.S. 228 (1979), the Court declared:

> [T]he question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.
>
> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private action, they may nevertheless be enforced through alternative mechanisms . . . .
>
> The Constitution, on the other hand, does not "partake of the prolixity of a legal code." McCulloch v. Maryland, 17 U.S. 316, 407 (1819). It speaks instead with a majestic simplicity. One of "its important objects" . . . is the designation of rights. And in "its great outlines" . . . the judiciary is clearly discernible as the primary means through which these rights may be enforced.

Id. at 241 (citations omitted). *See also* Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1949) (holding that the Constitution supports an implied federal cause of action for damages resulting from violations of constitutional rights). Thus, it would not be proper or correct to apply principles derived from constitutional federal common law cases to disputes where the rights of action asserted stem from a federal statute.

interest as proposed by *Barany v. Buller*[162] and its progeny.

B. Supreme Court Precedents on Federal Common Law

In the landmark decision of *Erie Railroad v. Tompkins*,[163] the Court overturned *Swift v. Tyson*[164] in holding that "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."[165] Henceforth, there was to be "no federal general common law."[166] As mentioned earlier, however, *Erie* did not altogether strip the federal courts of their lawmaking power. As Justice Jackson declared four years later in *D'Oench, Duhme & Co. v. FDIC*:[167]

> The federal courts have no *general* common law . . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.[168]

Thus, shortly after in *Clearfield Trust Co. v. United States*,[169] the Court held that federal, not state law governed the rights and obligations of the United States on the commercial papers it issues.[170] The court stated that the authority of the United States to issue checks arose from the Constitution and certain federal statutes and that it "was in no way dependent on the laws of Pennsylvania or of any other state."[171] Moreover, the rights and duties imposed on the United States as a result of the issuance of such commercial paper "find their roots in the same federal sources."[172] The Court went on to declare that "[i]n absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[173] These statements suggest that when the source of the right is federal and Congress has not spoken on the issue, the rule of law should be federal.

The Court, however, did not base its decision to apply a federal rule of decision of its own making on the federal nature of the

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162. 670 F.2d 726 (7th Cir. 1982).
163. 304 U.S. 64 (1938).
164. 41 U.S. (16 Pet.) 1 (1842). In *Swift*, the Court held that federal courts exercising jurisdiction based on diversity of citizenship need not apply state law to resolve the dispute before them. *Id.* at 18-19.
165. *Erie*, 304 U.S. at 78.
166. *Id.*
167. 315 U.S. 447 (1942).
168. *Id.* at 469 (Jackson, J., concurring).
169. 318 U.S. 363 (1943).
170. *Id.* at 366-67.
171. *Id.* at 366.
172. *Id.*
173. *Id.* at 367.

sources supporting the right. The Court recognized that it could choose and had previously chosen state law as the applicable federal rule. Nevertheless, in the case before it, this would be "singularly inappropriate."[174] Not only would "[t]he application of state law . . . subject the rights and duties of the United States to exceptional uncertainty," "[i]t would also lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states."[175] For these reasons, a uniform federal rule was in order.[176]

Thus, the Court decided to fashion a federal rule not so much because the Constitution and federal laws were implicated— that merely defined the matter as federal—but rather because uniformity was needed to protect the rights and duties of the United States in the area of commercial paper.[177]

However, such protection of the rights and obligations of the United States was not always deemed necessary. In *United States v. Yazell*,[178] the federal government asked the Court to develop federal common law so that it could collect on the balance of a loan made to Mrs. Yazell by the Small Business Administration (SBA).[179] Notwithstanding the federal interest involved, the Court decided not to fashion a federal rule.[180] In reaching this decision, the Court repeatedly emphasized the nature of the SBA contract with Mrs. Yazell as a "custom-made, hand-tailored, specifically negotiated transaction."[181] Unlike the issuance of checks in *Clearfield*, "[i]t was not a nationwide act of the Federal Government, emanating in a single form from a single source"[182] since the transactions of the SBA in each state were "specifically and in great detail adapted to state

174. *Id.*
175. *Id.*
176. *Id.*
177. At this early time, the concept of uniquely federal interest had not yet been developed. Rather, questions regarding the formulation of federal common law turned on whether the dispute implicated the rights and duties of the United States under federal statutes.
178. 382 U.S. 341 (1966).
179. *Id.* at 348-49. Mrs. Yazell contended that state law should apply which, at the time the contract was executed, provided that a married woman could not bind her separate property without a court decree removing her disability to contract. No such court decree had been issued, so Mrs. Yazell claimed she was not liable. *Id.* at 342-43. The Court acknowledged that the state law of coverture was "peculiar and obsolete," *id.* at 351, and that as a creditor, the United States had a legitimate federal interest in collecting on the loan, *id.* at 348.
180. *Id.* at 352.
181. *Id.* at 347-48.
182. *Id.* at 348.

law."[183] Because the Government was clearly able to follow local procedural requirements to obtain enforceable security interests, "[t]here is no problem in complying with state law" and so "[t]here is here no need for uniformity."[184] In support of its decision, the Court reiterated that its prior rulings in favor of formulating federal law had all typically involved "programs and actions which by their nature are and must be uniform in character throughout the Nation."[185] In short, state law should be superseded, the Court declared, only when "clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."[186]

After *Yazell*, the Court continued to limit the development of federal common law. In *Wallis v. Pan American Petroleum Corp.*,[187] the question once again was whether federal or state law governed. The answer affected the rights of private parties in an oil and gas lease issued under a federal statute,[188] the Mineral Leasing Act of 1920.[189] In both *Clearfield* and *Yazell*, the Court had answered this question by first determining whether the dispute involved a federal rather than state matter. If the dispute involved a federal matter, the Court would then proceed to consider whether a uniform federal rule of decision was necessary. The Court in *Wallis*, however, deviated from this established analytical approach. In deciding not to formulate federal common law, it focused on the second part of the analysis, ignoring the first altogether. State law, not federal law, applied because "we find no significant threat to any identifiable federal policy or interest."[190] In so holding, the Court declared that "the guiding principle is that a significant conflict between some federal policy

183. *Id.* at 357.
184. *Id.*
185. *Id.* at 354.
186. *Id.* at 352.
187. 384 U.S. 63 (1966).
188. *Id.* at 67.
189. 30 U.S.C. § 181 (1964).
190. *Wallis*, 384 U.S. at 68. One could point out that by concluding that no federal policy or interests were implicated in the dispute, the Court did indeed consider and answer in the negative the question of whether the matter was federal. Nevertheless, it reached this decision in a swift manner, giving little consideration to the plaintiff's contention that since the rights and duties derived from a federal statute, the matter was federal. More important, the Court's decision resulted in the narrowing of opportunities for characterizing disputes as federal and in further limiting the power of the federal courts to formulate common law. It achieved this result by making clear that the decision of whether a matter is federal turns on whether the federal government's rights and duties are implicated and not on whether federal rights held by private parties are involved, even when the rights and duties of the private parties derive from a federal source. As will become evident, this is exactly what the Court indicated in subsequent cases where the issue of private rights of action based on federal statutes or contracts arose. *See infra* notes 212-18 and accompanying text.

or interest and the use of state law . . . must first be specifically shown."[191] The Court then proceeded to limit the federal courts' authority to formulate federal rules, declaring that "[i]t is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."[192]

The significance of *Wallis* with respect to federal common law is not that the Court failed to follow its own test for determining when federal common law could be applied. Rather, *Wallis*'s significance lies in setting forth the requirement of a "significant"[193] conflict with state law. The fact that the Court failed to address the question of whether uniformity presented a "substantial" federal interest is also significant. Indeed, the Court's insistence that an identifiable conflict with state law must be specifically shown before federal common law could be fashioned suggested that the need for uniformity might not suffice.[194] Nevertheless, the Court did not so hold but left the question open. It thus appears that at the time of *Wallis*,[195] the federal courts could support the fashioning of federal common law through either the *Clearfield-Yazell* approach or the narrower *Wallis* approach. The *Clearfield-Yazell* approach gave the federal courts freedom to fashion federal common law, even absent a "specifically shown" conflict with state law, when Congress had not addressed the

191. *Id.* Note that the kind of conflict the Court refers to is not an *Erie* type of conflict, that is, one between state statutory or common law and federal common law, but rather a conflict of interests or policies between a state and the federal government.

192. *Id.*

193. At first sight, the Court's decision in *Wallis* seems to conflict with its prior rulings in *Clearfield* and *Yazell*, where the Court found authority to fashion federal law in the federal sources implicated and the national nature of the program involved and made no mention of the need for a conflict with state law. The Court in *Clearfield* maintained that in the absence of legislation, "it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield*, 318 U.S. at 367. And in *Yazell*, the Court noted that "in the cases applying state law to limit or condition the enforcement of a federal right, the Court has insisted that the state law is being 'adopted' as the federal rule." *Yazell*, 382 U.S. at 356. Yet in both *Clearfield* and *Yazell*, the Court recognized, albeit implicitly, the existence of a conflict between a state interest and a federal interest, that of uniformity, finding the federal interest paramount in the former case and in no need of protection in the latter.

194. Consider that in introducing the *Wallis* conflict approach, the Court made no mention of *Clearfield*, nor of the need for uniformity as a possible federal interest, an interest that automatically conflicts with state law and which the Court in *Clearfield* found to favor heavily the application of federal common law.

195. The decision in *Wallis* was handed down in 1966.

issue at bar, the matter was deemed to be federal, and uniformity of law was required for the successful operation of a nationwide federal program. The *Wallis* approach, on the other hand, restricted the courts' lawmaking powers to only those instances in which a federal interest substantially conflicted with state law even when the matter was deemed federal.[196]

That federal courts continued to have the power to fashion substantive law in federal matters, particularly when the issues involve the operation of a nationwide federal program, is apparent from several other Supreme Court decisions. Consider both *United States v. Little Lake Misere Land Co.*[197] and *United States v. Kimbell Foods, Inc.*[198] In *Little Lake*, the United States sought to quiet title to two parcels of land[199] acquired under the Migratory Bird Conservation Act.[200] In reaching the decision that federal, not state law governed the interpretation of the Migratory Bird Conservation Act, the Court relied heavily on the fact that the land acquisitions arose from and bore heavily upon a federal regulatory program.[201] In respect to the issue of judicial lawmaking, the Court declared:

> There will often be no specific federal legislation governing a particular transaction to which the United States is a party; here, for example, no provision of the Migratory Bird Conservation Act guides us to choose state or federal law in interpreting federal land acquisition agreements under the Act. But silence on that score in federal legislation is no reason for limiting the reach of federal law. . . . To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.[202]

Thus the Court clearly established the lawmaking powers of the federal courts where federal legislation is involved, and particularly where legislation creates nationwide federal programs. Moreover, it did so by maintaining that it had a constitutional responsibility for assuring the effectuation of the statutory purposes enacted by Congress.[203]

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196. This difference in approach was recently dealt with by the Court in Boyle v. United Technologies Corp., 487 U.S. 500 (1988). *See infra* notes 224-34 and accompanying text.

197. 412 U.S. 580 (1973).

198. 440 U.S. 715 (1979).

199. Although one parcel was bought outright and the other by condemnation, both the sale and the condemnation judgment reserved to Little Lake the mineral and oil rights for a specified period. *Little Lake*, 412 U.S. at 582. The district court found that under the terms of these instruments, fee title in the United States ripened, extinguishing Little Lake's mineral rights. *Id.* at 583. Little Lake, however, contended that a state statute enacted after the contracts were entered into invalidated the United States' rights to assign the mineral rights. *Id.* at 584. In the end, both the district court and the court of appeals ruled in favor of Little Lake. *Id.*

200. 16 U.S.C. § 715 (1926).

201. *Little Lake*, 412 U.S. at 592.

202. *Id.* at 593.

203. *Id.* As noted earlier, this was not the first time the Court insisted that it had

Similarly in *Kimbell*, the Court faced the decision of whether a national rule was necessary in order to protect the interests of the United States as a creditor.[204] In reaching the decision that state commercial law should govern, the Court reiterated its position that "federal law governs questions involving the rights of the United States arising under nationwide federal programs."[205] Citing *Little Lake* and *Clearfield*, the Court went on to declare: "It is precisely when Congress has not spoken 'in an area comprising issues substantially related to an established program of government operation,'[206] that *Clearfield* directs federal courts to fill the interstices of federal legislation 'according to their own standards.' "[207] The actual content of the federal rule, however, was a difficult matter that could only be determined after noting "a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."[208]

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the power and the duty to develop law for the purpose of forwarding the policies and purposes of federal legislation. *See* D'Oench, D'Hume & Co. v. FDIC, 315 U.S. 447, 470 (1942), where Justice Jackson in his concurring opinion declared: "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." *Id.* at 470 (Jackson, J., concurring).

204. *Kimbell*, 440 U.S. at 718. The United States had made a loan and accepted as security certain personal property that had also been accepted as security by a private creditor. Both the government and the private creditor had initiated proceedings to foreclose on the collateral, each claiming priority over the other. *Id.* at 718-25. The Court, after determining that the federal act under which the federal loan was made did not specify priority rules to govern security interests, declared that although the matter was federal, state law would be adopted as the federal rule. *Id.* at 740.

205. *Id.* at 726.

206. *Id.* at 727 (quoting *Little Lake*, 412 U.S. at 593 (quoting Paul J. 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, 800 (1957))).

207. *Id.* (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)).

208. *Id.* at 728 (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)). Two of these considerations involved the question of the need for uniformity and whether application of state law would frustrate the specific objectives of the federal programs. *Id.* The Court also noted the importance of ascertaining the extent to which application of a national rule would disrupt commercial transactions predicated on state law. *Id.* at 729. Taking all of these factors into consideration, the Court concluded that no uniform rule was necessary to protect the interests of the United States since compliance with state law "would produce no hardship on the agency," *id.* at 730, nor "frustrate the objectives of the lending programs," *id.* at 734. State law would apply as the federal rule for the same reasons as in *Yazell*. Although the agency regulations no longer contained admonitions to follow state law, each loan was still individually negotiated "in painful particularized detail." *Id.* at 730 (quoting United States v. Yazell, 382 U.S. 341, 345-46 (1966)). The regulations themselves suggested that state law would determine the priority of liens where the federal statutes or regulations were not controlling. *Id.* at 731-32. For these reasons, the government's contention that application of state law would frustrate the purposes of the lending programs was without merit.

Thus, the Court has shown itself to be quite solicitous of the rights and interests of the federal government and quite willing to fashion federal rules of decision for their protection. This is true regardless of which method, *Clearfield-Yazell* or *Wallis,* the Court chooses to justify its lawmaking powers or, just as important, the nature of the federal interest involved. As has been shown, the content of the interest can be as diverse as the policies underlying federal legislation or the objectives of federal programs. However, not all federal interests qualify. As *Wallis* intimated, when the source of the right is federal but the dispute is between private parties, there may be no federal interest worthy of the Court's protection.[209] In other words, it is not enough that the interest derive from a federal source; it must also directly affect the rights and duties of the federal government for the Court to have the authority to make law. Thus, in *Bank of America Trust and Savings Ass'n v. Parnell,*[210] the Court refused to fashion federal law because "[t]he present litigation is purely between private parties and does not touch the rights and duties of the United States."[211]

In *Parnell,* petitioner Bank of America brought suit in federal district court alleging that the defendants had converted government bonds which had previously disappeared while being prepared by the Petitioner for presentation to the Federal Reserve Bank for payment.[212] Defendants contended, and the court of appeals held, that the issue was governed by the rule in *Clearfield.*[213] The Court, however, declared that their reliance on *Clearfield* was misguided: "[t]he 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 far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern."[214]

209. Recall that in *Wallis,* two private parties each claimed rightful ownership of an oil and gas lease to federal land. The Court did not explicitly say that federal common law cannot be formulated when the dispute is between private parties and there is no significant federal interest involved, but it came close when it stated that "[a]part from the highly abstract nature of this interest [that of using federal law to settle disputes between private parties over federal land], there has been no showing that state law is not adequate to achieve it." Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 71 (1966). *See supra* notes 187-92 and accompanying text.

210. 352 U.S. 29 (1956).

211. *Id.* at 33. *Clearfield* "compels the application of federal law to the entire case." *Id.*

212. *Id.* at 30-31.

213. *Id.* at 33.

214. *Id.* at 33-34. The dissenters pointed to the uncertainty that would follow from the Court's decision, underscoring the "virtue of a uniform law governing bonds, notes, and other paper issues by the United States," so that one set of rules would govern the rights of all parties to government paper rather than fifty. *Id.* at 35. Yet the majority

Parnell is not the only case where the Court has shown its reluctance to fashion common law absent a clear federal interest implicating the rights and duties of the United States. In *Miree v. DeKalb County*,[215] the Court recognized that "the United States [had] a substantial interest"[216] in the matter before it; nevertheless, it held that state law should govern the claim because "only the rights of private litigants are at issue here,"[217] and their claim "will have no direct effect upon the United States or its Treasury."[218] Thus, it appears that unless uniformity is necessary to protect the operation of a federal program, uniformity by itself will not call into action the Court's protective lawmaking powers, and neither will certain federal policies, namely those that do not directly impact the rights and obligations of the federal government and, in particular, its treasury.

This is not to say that the Court has always fashioned itself to be the protector of the treasury. In *United States v. Standard Oil Co.*,[219] the federal government brought suit to recover the amount it had expended for the hospitalization and loss of service of a soldier who was injured when struck by defendant's truck.[220] The Court

found that no uniformity was necessary, thus bringing into question the notion that uniformity is important for its own sake. But one should not forget that in *Clearfield* it was the government and not private parties that would be subject to the vagaries of state law absent a uniform federal rule. Moreover, in *Clearfield* the federal government stood to pay twice if state law applied, whereas in *Parnell* the federal government was obliged to pay only once regardless of whether federal or state law governed. In this respect, the majority in *Parnell* was correct in its assessment that the only federal interest involved was "far too speculative, far too remote" since the government would not be subject to any loss under state law. *Id.* at 33-34.

215. 433 U.S. 25 (1977). Here, survivors of deceased aircraft passengers petitioned the Court to fashion federal common law allowing them to sue as third-party beneficiaries to a contract between the Federal Aviation Administration and the county. The contract called upon the county "to restrict the use of land adjacent to . . . the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft." *Id.* at 27. The county breached the provision by operating a garbage dump near the airport which allegedly attracted a swarm of birds, causing a plane to crash.

216. *Id.* at 31 (referring to the regulation and promotion of air travel safety).

217. *Id.* at 30.

218. *Id.* at 29.

219. 332 U.S. 301 (1947).

220. *Id.* at 302. Although state law provided that masters could recover for loss of servants' services, the United States could not because the government-soldier relationship was not encompassed by the scope of the state statute and because " 'the government is not a "master" and the soldier is not a "servant" within the meaning of the [state] Code section.' " *Id.* at 304 n.4 (quoting Standard Oil Co. of Cal. v. United States, 153 F.2d 958, 961 (9th Cir. 1946)). The United States sought to avoid the state rule, contending that federal, not state law, controlled since the issue presented a federal question. *Id.* at 305.

wholeheartedly agreed with the federal government's contention that the relationship between the government and members of the armed forces was a federal matter.[221] Yet it refused to fashion a federal rule in favor of the government because: "Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse."[222]

One should observe that while the government in *Standard Oil* had a substantial interest in the dispute, there was actually no real conflict of laws or interests involved because there was no federal law per se with which state law conflicted and because there was no state policy or interest precluding recovery since state law allowed recovery in similar master-servant situations. The main problem with the state law was that it was not broad enough to include the government-soldier relationship. In addition, had the Court acted in favor of the government, it would have been required to impose a new liability by fashioning an entirely new rule rather than merely to fill the gaps in existing legislation. Yet the Court declined the opportunity to go substantially beyond what it had hereunto done to protect federal interests. Thus it appears that the Court is as reluctant to create new causes of action when uniquely federal interests are at stake as it is when its lawmaking powers derive from a grant of Congress by way of a statute that contains a comprehensive remedial scheme. Consequently, there is some support for the proposition that the Court has imposed limitations on the federal courts' power to formulate federal common law even when uniquely federal interests are involved.

Recently, however, the Court exercised its judicial hand (perhaps so as to preclude its "stiffen[ing] in mortmain"[223]), by assuming the role of champion of the national purse. In *Boyle v. United Technologies Corp.*,[224] the Court once again faced the decision of whether to

221. *Id.* Thus, the Court stated: "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." *Id.*

222. *Id.* at 314. The Court further acknowledged that the law in its capacity for growth "must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking." *Id.* at 313. But it maintained that the work of the federal courts, outside the constitutional area "is more modest than that of state courts, particularly in the freedom to create new common-law liabilities." *Id.*

223. United States v. Standard Oil Co., 332 U.S. 301, 313 (1947).

224. 487 U.S. 500 (1988).

formulate a new rule of law and answered this question in the affirmative by creating the government contractor defense.[225] The Court reasoned that without this defense, contractors would be liable under state law and that this would impact the government such that "the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected."[226]

In reaching this decision, the Court explained that although the procurement of equipment by the United States constituted a uniquely federal interest, an additional factor was necessary to supplant state law. That factor was a genuine conflict with state law.[227] The conflict, however, "need not be as sharp" as that required for ordinary preemption when Congress enacts law in a field previously occupied by state law.[228] "Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can."[229] The Court then cited *Clearfield* for the proposition that "where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules."[230]

Given the Court's previous decision in *Standard Oil* and its professed disinclination to fashion law absent a clear statutory prescription or a direct conflict that clearly threatens the government's policies or operation, the dissent's opposing arguments deserve strong consideration.[231] In view of *Standard Oil*, *Boyle* may very well have

225. *Id.* at 512. Here, a tort law cause of action was brought against the manufacturer of a military helicopter that crashed at sea, causing the death of its pilot by drowning. Plaintiffs contended that the helicopter's escape system was defective because, among other things, the door opened outward instead of inward, which impeded the pilot's ability to escape when the helicopter was submerged. *Id.* at 502-03.

226. *Id.* at 507.

227. *Id.*

228. *Id.*

229. *Id.* at 507-08.

230. *Id.* at 508 (citation omitted).

231. The dissent maintained that the Court had overstepped its authority in legislating from the bench. Congress had already considered and rejected "a sustained campaign by Government contractors to legislate for them some defense." *Id.* at 515 (footnote omitted). Furthermore, they observed that " '[t]here is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it,' " *id.* at 517 (quoting Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988)), or without a clear showing that state law does " 'major damage,' " *id.* at 519 (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)), to the federal interests. In the views of the dissent, the issue was, as in *Miree, Parnell,* and *Wallis*, collateral to the government contract, and the litigation itself was between private parties. *Id.* at 520-21.

been wrongly decided. Perhaps the nature of the rule of law that the Court fashioned—the establishment of a defense rather than the imposition of a liability—helps explain the majority's decision. Nevertheless, for the purposes of this Comment, the Court's statements regarding the kind of conflict necessary to justify the application of federal common law cast light on our previous finding[232] concerning the different approaches a federal court could take in formulating federal common law.

The Court's recognition that a uniquely federal interest is necessary but not sufficient to justify the making of law supports the proposition that the Court has moved away from the *Clearfield/Yazell* route of justifying lawmaking to embrace the conflict path first outlined in *Wallis*. However, while the Court in *Wallis* required a "significant threat to any identifiable federal policy or interest"[233] to invoke the application of federal law, the Court in *Boyle* significantly curtailed the requirement of a significant conflict. Although it insists that "conflict there must be,"[234] apparently the need for uniformity as shown in *Clearfield* is reason enough to develop preemptive federal law. Thus, by adhering to the conflict requirement while relaxing the criteria of what makes a conflict significant, the Court seems to have reconciled the two approaches.

From this it follows that federal courts that interpret *Boyle* to mean that a conflict is required for legitimate lawmaking may still say that the need for uniformity represents a conflict sufficient to justify formulation of federal rules of decision. But whereas the *Clearfield-Yazell* approach sets limits on a court's competence to develop law by requiring a federal source for the rights asserted or at least a background of relevant federal statutes, the new course frees the courts from this restriction. It allows the courts to fashion rules, as did the Court in *Boyle*, *in vacuo* or even in the face of some congressional disapproval as long as the court determines that a federal interest is in jeopardy. Contrary to *Standard Oil*, *Boyle* also makes clear that the protection of the national purse is such an interest and thus justifies the formulation of federal rules of decision.

In short, the answer to the question of what exactly constitutes a

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It "neither touch[es] the rights and duties of the United States,'" *id.* at 521 (quoting Bank of Am. Nat'l Trust and Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956)), nor "has a 'direct effect upon the United States or its Treasury,'" *id.* at 521 (quoting Miree v. DeKalb County, 433 U.S. 25, 29 (1977)). Moreover, the dissent indicated that even if the majority was correct in its assessment that the government would be financially burdened since liable contractors would pass on the cost to the government (a deduction that the dissent found faulty), precedent supported the view that the imposition of costs was "legally irrelevant." *Id.* at 527. After all, as *Wallis* indicated, the Court was not the guardian of the government's purse.

232. *See supra* notes 193-96 and accompanying text.

233. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).

234. *Boyle*, 487 U.S. 508.

uniquely federal interest appears to be that any type of federal interest, especially that of safeguarding the national treasury, may qualify as uniquely federal as long as it directly affects the rights and duties of the United States. But as has been shown, there is another critical question: whether the interest requires *protection* because the underlying federal policy conflicts with state law or because uniformity is necessary to maintain the smooth running of a federal nationwide program. In light of *Boyle*, such a determination renders a federal court competent to develop and apply federal common law.

C. Application of Supreme Court Precedents to Determine Whether State Law or Federal Common Law Should Apply in Actions Charging Former Officers of Federal Savings and Loan Associations with Breach of Fiduciary Duties

As mentioned earlier, federal courts that have held in favor of fashioning a federal common law cause of action either for breach of fiduciary duties or for breach of bylaws base their decisions on the presence of a uniquely federal interest in the uniform regulation of federal financial institutions. The courts reached this decision by examining the objectives of the act under which the institution was chartered (the HOLA or the FCUA). These examinations revealed that Congress enacted the HOLA and the FCUA to address the status of the nation's financing system and the inadequacy of state law to deal with the problem. It was Congress's hope that the regulations promulgated under these statutes would result in uniform and sound lending practices. The great extent to which these institutions are regulated, the comprehensive nature of those regulations, and the plenary authority of the regulatory bodies supported the courts' conclusion that uniformity in the regulation of federal financial institutions is, if not of paramount importance, at least a significant congressional objective.[235] Thus, there appear to be some grounds for holding that uniformity in the regulation of federal financial institutions represents a uniquely federal interest.

But as explained above, a uniquely federal interest is not enough to justify formulating federal common law. As *Boyle* indicated, a conflict between a federal policy and state law is required to displace state law. One is therefore left with the question of whether application of state fiduciary law in cases involving the alleged violation of federal lending regulations would conflict with the pertinent federal

235. *See supra* notes 17-24, 63-68, and accompanying text.

laws and their underlying policy or interfere with the operation of federal savings and loan associations as a nationwide federal program. This question is further complicated by the fact that one is dealing with uniformity in two respects: uniformity as a federal objective of the legislation and uniformity as a possible requirement of the program for its successful functioning.

As can be seen from the cases discussed in the previous section, the Court has, from very early on, recognized the importance of uniform regulation in the operation of nationwide federal programs,[236] even in respect to legislative acts that are silent on the need for uniform implementation. This remains true today as the Court in *Boyle* clearly indicated. One would therefore expect that great weight would be given to the need for uniformity when an act's legislative history reveals that Congress actually identified uniformity as one of the act's principal objectives.

Both the HOLA and the FCUA are this type of legislation. Not only were both acts designed to address a national problem, but their histories reveal that Congress was actually motivated by the need for uniformity in the regulation of federal financial institutions.[237] Moreover, unlike the SBA regulations, which according to the Court in *Yazell* were replete with admonitions to follow state law, the regulations promulgated under the HOLA make it perfectly clear that the Board expects federal law, not state law, to apply to matters involving the internal affairs of federal savings and loan associations. In May 1983, the Board made this evident when it issued C.F.R. § 545.2, which provided that the regulations are "promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operation of Federal associations . . . . This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of Federal associations."[238] The Supreme Court further supported the Board's

236. Even in the area of commercial paper, which is not regulated by a federal program, the Court in *Clearfield* declared that the application of state law was "inappropriate" because it would subject the United States to the vagaries of state law. *See supra* note 175 and accompanying text. The importance of uniformity was later reaffirmed in *Yazell* and *Kimbell.* Although the Court held against the application of federal common law in those cases, it did so because the transactions were individually negotiated and because the regulations of the federal programs themselves called for adherence to state law. *See supra* notes 182-84 and accompanying text.

237. *See supra* notes 17-24, 63-68, and accompanying text. It would, therefore, be difficult to argue that uniformity was not a primary objective of Congress when it enacted the HOLA and the FCUA. It would also be unreasonable to propose that federal savings and loan associations and federal credit unions do not form part of a national program in view of the regulatory role that both the Board (now the OTS) and the NCUA play in the operation of these institutions. *See supra* note 114.

238. FSLIC v. Kidwell, 716 F. Supp. 1315, 1316 (N.D. Cal. 1989).

power to issue such regulations by stating that "Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular State—deemed to be the 'best practices.'"[239]

Yet the court in *AmeriFirst v. Bomar*[240] decided against fashioning federal common law because no significant conflict exists between state fiduciary law and a federal policy. Apparently, the court in *Bomar* failed to consider the legislative purpose of the HOLA and the policy of uniformity itself as a compelling congressional objective. But should the court have taken these factors into account? While an examination of the HOLA reveals that uniformity was one of its objectives when it was first enacted in 1933, the same cannot be said of the FIRREA, which amended the HOLA in 1989 to provide, among other things, a federal cause of action for breach of fiduciary duty. The cause of action, however, is available only to the FDIC.[241] This gives rise to the presumption that Congress intended state law to apply in actions involving private parties.[242] In view of these developments, the contention that federal law applies to *all* matters involving the operation of federal savings and loan associations is no longer tenable. Just as important, FIRREA suggests that with respect to actions for breach of fiduciary duties, there is currently no federal objective in uniform regulation and, consequently, no significant conflict were state law to apply in these actions.

The *Bomar* court furthermore maintained that applying state fiduciary law would not interfere with the successful operation of the federal program nor threaten the federal insurance fund even though violations of federal regulations would only constitute "*some evidence* that Defendants breached their fiduciary duties under the substantive principles of state law."[243] In so holding, the court gave little consideration to possible impact on the federal savings and loan association program of holding directors and officials of federal institutions liable under a law that would view violations of federal regulations as a secondary issue. Given that the regulations allegedly violated in these actions control the lending practices and conduct of

239. Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 161 (1982).

240. 757 F. Supp. 1365 (S.D. Fla. 1991). *See supra* notes 79-85 and accompanying text.

241. *See supra* note 114.

242. Perhaps because with regard to the regulation of financial institutions, state law can now adequately deal with these problems. Although as mentioned earlier, *see supra* note 65, research is needed to ascertain the adequacy of state law in this area.

243. *Bomar*, 757 F. Supp. at 1374 (emphasis added).

officers and directors, it would seem that the regulations themselves form a kind of fiduciary guideline by which the Board, now the Office of Thrift Supervision (OTS), determines the propriety of the actions of those whom it regulates. Imposing state law that subjects officers of federal saving and loan associations to other regulations or principles could lead to great confusion as to which law, federal or state, determines their legal duties. At worst, the regulation of officers and directors could be undermined if they were subject to state laws that afford little significance to the policies underlying the federal regulations.

Nevertheless, this argument would only hold if the state regulations differed substantively from the federal guidelines. This notwithstanding, state fiduciary law is unlikely to overlook the violation of federal regulations. One should also note that the FIRREA's federal standard of gross negligence is quite high, higher in fact that some state fiduciary law standards.[244] Thus, even if the violation of federal regulations were treated as a subsidiary question under state law, the state's lower negligence standard may more than compensate for any failing on the part of state law to support the federal policies. Furthermore, it seems unlikely that the application of state fiduciary law in disputes between private parties would lead to confusion regarding the nature of the duties of officers and directors of federal savings and loan associations or the applicable regulations in these cases. The more probable outcome is that officers and directors will realize that their fiduciary duties are defined by both state and federal law. Lastly, it is just as unlikely that application of state fiduciary law would undermine the OTS's attempts to regulate federal financial institutions in light of the expanded power of enforcement the FIRREA provides.[245]

The notion that the federal insurance fund would not be threatened were state law to apply also weighs heavily against the formulation of federal common law. Although plaintiff associations appear to have suffered damage due to the alleged negligent violation of federal lending practices, they have apparently not suffered enough damage to seek the assistance of the FDIC and the federal insurance fund. For this reason, the Court is unlikely to find that a

244. As mentioned, the FIRREA's gross negligence standard does not apply to private parties, but only to the FDIC. *See supra* notes 5, 114. Nevertheless, courts that decide to formulate a federal common law cause of action are likely to look to the standard that the federal government has imposed on itself in giving shape to the federal common law standard that is to apply in these actions. From this it follows that private parties should first ascertain whether state law poses serious problems before requesting that a federal common law cause of action be established lest they find themselves in a more difficult position when their request is granted and the standard that is adopted is that of gross negligence.

245. *See supra* note 114 and accompanying text.

sufficient nexus exists between the violations and the government's interest, let alone conclude that the federal interest in a healthy insurance fund is at risk and in need of the Court's protection. Although uniformity in the regulation of federal savings and loan associations may be required in some respects, uniformity of law for breach of fiduciary duties appears unnecessary.

Other reasons make it even more unlikely that the Supreme Court would formulate federal common law in these cases. Recall that as private parties, federal savings and loan associations that request the formulation of a federal common law cause of action for breach of fiduciary duty have no private cause of action under the HOLA-FIRREA. And as *Wallis*, *Parnell*, and *Miree* demonstrate, the Court is entirely unwilling to formulate federal common law in favor of private parties absent a direct impact on the rights and duties of the United States, which, as has just been shown, is absent here. The Court could also hold, as it has done so often in the past, that the federal interests involved are far too speculative and remote to warrant the application of federal common law.[246] Therefore, rather than develop federal common law, the Court is more likely to apply the strict *Touche Ross* test for implications of private rights of actions and end the inquiry there.

The answer to the question with which this Part began, namely whether uniformity in the regulation of federal savings and loan associations represents a uniquely federal interest, thus seems clear. Although one can find in the HOLA's legislative history support for the proposition that uniformity in the regulation of federal savings and loan associations is a federal interest, it is not a uniquely federal interest justifying the fashioning of federal common law. As to whether there are limitations to the federal courts' lawmaking powers when uniquely federal interests are involved, the answer also seems clear. The Court has over the years consistently refused to create new causes of action or rights in favor of private parties under federal common law.[247] While the Court is willing to fill the gaps in legislation and to fashion a defense when it deems that the rights

246. *See supra* note 214 and accompanying text.

247. Recall that in *Standard Oil* the Court denied the federal government's request that it fashion a new common law liability in the government's favor. The Court in *Standard Oil* clearly held that the matter at bar was federal and even acknowledged that the government's purse would be affected. Yet it held that only Congress had the power to create new rights and liabilities. *See supra* note 222 and accompanying text. And in *Boyle* the Court fashioned a new defense, not a new liability. *See supra* note 225 and accompanying text.

and duties of the United States or its treasury are in need of protection, it goes no further. When dealing with uniquely federal interests, the federal courts' lawmaking power is as limited as when the power stems from a grant of Congress. In neither instance do the courts have the authority to create new rights or new liabilities.

D. *Application of Supreme Court Precedents to Determine Whether State or Federal Common Law Should Apply in Actions Involving Officers of Federal Credit Unions Charged with Breach of Bylaws*

The question presented by the federal credit union cases discussed previously is similar to the issue involved in the federal savings and loan association cases, though somewhat more complicated. In the latter cases, the courts primarily addressed the question of whether the need for uniformity justifies preempting state fiduciary law with federal common law. To be sure, the issue of state law preemption also forms part of the federal credit union problem. But the federal credit union cases also present another controversial preemption question: whether the federal legislation in question itself preempts the application of federal common law. Indeed, in order to determine whether it can legitimately formulate federal common law, a court must first conclude that the pertinent legislation does not preclude the fashioning of federal common law.[248] From this it follows that in the federal credit union cases one must answer not one but two questions: whether the FCUA preempts federal common law, and if not, whether federal common law should be applied to create a private cause of action.

In ruling against the creation of federal common law, the court in *Ridenour v. Andrews Federal Credit Union*[249] cited the Supreme Court's decision in *City of Milwaukee v. Illinois* (*Illinois II*)[250] for the proposition that "[f]ederal courts lack authority to impose more stringent [standards] under federal common law than those imposed by the [federal] agency charged by Congress with administering the

248. In the federal savings and loan association cases discussed earlier, the comprehensive nature of the federal regulations was offered to show that the entire field was preempted by federal law, but surprisingly the courts gave little consideration to this issue. The courts probably reasoned that they need not be concerned about whether the judicial standard would be stricter than the one imposed by the regulatory agency (the Board, now the OTS) since the agency played a limited role in after the fact suits brought by private parties. But the same cannot be said of the controversies over democratic governance in the federal credit union cases since the disputes were ongoing, and the NCUA had the authority to resolve them. *See supra* note 114. The NCUA, however, refused to do so, causing plaintiffs to turn to the courts. Thus, the issue of legislative preemption arose in these cases as the courts were being asked to act where the agency had not.

249. 897 F.2d 715 (4th Cir. 1990). *See supra* notes 39-47 and accompanying text.

250. 451 U.S. 304 (1981).

comprehensive [regulatory] scheme."[251] Because the NCUA has chosen not to become involved in disputes over the democratic governance of federal credit unions and has chosen not to give the bylaws establishing such governance the status of agency regulations, the court concluded that it lacked authority to establish a federal common law cause of action.[252]

Other courts have not been as quick to dismiss plaintiff's cause of action under federal common law. As noted, the courts in *Barany v. Buller*[253] and *First Hawaiian Bank v. Alexander*[254] proposed that "federal common law remedies are not precluded where the statute's remedies do not afford the aggrieved parties at least a reasonable alternative to the relief sought."[255] The *Barany* court further concluded that because the relief sought in the present action was not "co-extensive" with that provided by the FCUA, the preemption rule articulated in *Illinois II* did not apply.[256]

However, an examination of the Supreme Court's decision in *Illinois II* reveals that the Court based its decision to supplant its previous ruling in *Illinois v. City of Milwaukee (Illinois I)*[257] on the comprehensive nature of the remedial scheme that the recent amendments to the Federal Water Pollution Control Act [258] had instituted.[259] The Court declared that in enacting the amendments, Congress intended "to establish an all-encompassing program of water pollution regulation"[260] and that "[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when . . . *[Illinois I]* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."[261] The decision to preempt the federal common law previously established came about not because

251. *Ridenour*, 897 F.2d at 722 (quoting City of Milwaukee v. Illinois (Illinois II), 451 U.S. at 320).
252. *See supra* notes 46-47 and accompanying text. The *Montford* court also relied on the FCUA's comprehensive remedial scheme and the regulatory powers given to the NCUA in holding that Congress intended the NCUA, not the courts, to settle this kind of dispute. *See supra* notes 55-58 and accompanying text.
253. 670 F. 2d 726 (7th Cir 1982). *See supra* text accompanying notes 11-27.
254. 558 F. Supp. 1128 (D. Haw. 1983). *See supra* text accompanying notes 70-78.
255. *Id.* at 1132 (citing *Barany*, 670 F.2d at 736).
256. *Barany*, 670 F.2d at 737.
257. 406 U.S. 91 (1972).
258. 33 U.S.C. §§ 1311, 1342 (Supp. III 1976).
259. City of Milwaukee v. Illinois (Illinois II), 451 U.S. 304, 311-12 (1972).
260. *Id.* at 318.
261. *Id.* at 319.

the relief requested under federal common law was "co-extensive" with the one provided by the statute, as the *Barany* court suggested, but rather because the federal common law standard was more stringent than that imposed by the federal agency responsible for enforcing the statute,[262] as the court in *Ridenour* indicated. Thus, there is little support for the *Barany* court's proposition that federal common law is not preempted by legislation when the relief requested differs from that available under a comprehensive federal act.

Furthermore, the rationale the Court used in *Illinois II* to determine whether the recent amendments preempted federal common law, namely the comprehensive nature of the act's remedial scheme, is reminiscent of the approach taken by the Court in *Touche Ross & Co. v. Redington*[263] in determining that an implied cause of action was not available under the SEA. And, as was noted above, the FCUA's remedial scheme is no less comprehensive than that of the SEA's, which the Court in *Touche Ross* found to be comprehensive enough to support the assumption that Congress had provided exactly the remedies it deemed appropriate.[264] This supports the position that the comprehensive nature of the FCUA's remedial scheme precludes the fashioning of additional remedies by the judiciary under *Illinois II* regardless of whether the judicial remedies are co-extensive with the ones provided by the statute.

Before concluding that a federal common law cause of action for breach of bylaws is preempted by the FCUA's remedial scheme, however, one must also consider that it might be inappropriate to speak of legislation preempting federal common law where no federal common law has yet to be established in the area. In *Illinois II*, the Court faced the decision of what to do with its previous ruling that the federal common law of nuisance applied in matters involving interstate pollution, given that Congress had thereafter acted to strengthen the statutory law and had provided for its rigorous enforcement.[265] But no such backward-looking decision was called for in *Barany* since the decision to apply federal common law to the issue before it was one of first impression. The relevance of the *Illinois II* ruling to the federal credit union issue is therefore questionable, at least in those jurisdictions that have not established federal common law in this area.

Additionally, were the FCUA's remedial scheme to preempt the formulation of federal common law, the possibility of obtaining any relief at all would be seriously jeopardized. Whereas plaintiffs in the federal savings and loan association cases have recourse to state law

262. *Id.* at 320.
263. 442 U.S. 560 (1979).
264. *See supra* notes 108-10 and accompanying text.
265. *Illinois II*, 451 U.S. at 307-08.

when their claim for the application of federal common law is denied, the same might not hold for those federal credit union plaintiffs who allege unlawful removal from office. As the court in *Rosenberg v. AT&T Employees Federal Credit Union*[266] indicated, state law may provide no relief. The plaintiffs also have no administrative remedies to exhaust as the NCUA is unwilling to hear their complaints. While the court in *Montford v. Robins Federal Credit Union*[267] may be correct in pointing out that the NCUA is the proper forum in which to submit such complaints, and indeed the only forum that may provide uniform decisions, the NCUA's refusal to resolve such complaints cancels this alternative.[268]

One should also consider that the NCUA has not explained to the courts why it refuses to handle controversies involving the democratic governance of federal credit unions. It is possible that the agency refuses to become involved not because it feels the issue is unimportant, but because of other factors, such as insufficient resources to investigate and resolve these disputes. In light of this, the rationale presented by the *Ridenour* court supporting its decision not to adjudicate disputes over the democratic governance of federal credit unions simply because the NCUA is unwilling to do so seems misguided.

The ruling in *Illinois II*, moreover, does not dictate this result. To be sure, the Court declared that federal courts cannot impose more rigid standards than those imposed by the agency. But in the federal credit union cases, the court would not be imposing a stricter standard than the agency since the NCUA imposes no standard at all. Further, the issue presented by the federal credit union cases is different from the one involved in *Illinois II*. In *Illinois II* the agency acted to enforce the provisions of the statute while plaintiffs pursued a cause of action under federal common law.[269] On the other hand, in the federal credit union cases, the agency refused to act, and plaintiffs had no express statutory recourse. For these reasons, statutory law should not preempt federal common law, at least with respect to issues involving the democratic governance of federal credit unions.

Still this is not to say that federal courts have the authority to

266. 726 F. Supp 573 (D.N.J. 1989). *See supra* notes 28-38 and accompanying text.

267. 691 F. Supp. 347 (M.D. Ga. 1988). *See supra* notes 48-59 and accompanying text.

268. *See supra* note 36 and accompanying text.

269. *Illinois II*, 451 U.S. at 310-12.

fashion federal common law in this area. The arguments in favor of applying federal common law in the federal credit union cases suffer from the same problems as the arguments presented in favor of applying federal common law in the federal savings and loan association cases. While the FCUA's legislative history calls for the uniform regulation of federal credit unions, this, by itself, falls short of the requirements for formulating federal common law because (1) it appears that the democratic governance of federal credit unions is not essential for the operation and maintenance of these institutions as a nationwide federal program (or the NCUA would certainly be involved), and (2) the failure to apply federal common law would not infringe the rights and duties of the United States nor threaten the national treasury.

Further, Congress appears to be either satisfied with the present level of uniform regulation of federal financial institutions or less concerned with uniform regulation altogether. The fact that it amended the FCUA to create a new private right of action for whistleblowers[270] but failed to provide one for federal credit union employees who are unlawfully dismissed indicates that, at least in this respect, Congress is content with the current scope of the FCUA's enforcement scheme.

Lastly, even if uniform regulation were to constitute a uniquely federal interest, the courts still lack the power under federal common law to fashion a new private cause of action. As noted earlier, the comprehensiveness of the FCUA's remedial scheme raises the presumption that Congress provided exactly those remedies it deemed appropriate.[271] And as has been shown, the Court is just as unwilling to create new causes of action by means of federal common law as it is to imply them from a statute. Thus, even though plaintiffs may not have a remedy under state law, the federal courts are powerless to help them. This state of affairs provides a strong argument in favor of allowing the federal courts to resume their traditional role of fashioning remedies for wrongs.[272]

V. CONCLUSION

In view of these findings, one may ask why courts such as *Barany*, *Rosenberg*, *First Hawaiian Bank*, and *Kidwell* fashioned a federal common law right of action notwithstanding their conclusion that

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270. *See supra* note 116.

271. *See supra* part III.C.

272. See Justice Stevens's dissent in *Middlesex*, 453 U.S. at 24 n.7 (Stevens, J., dissenting) (citations omitted), in which he writes: "Although the federal courts do not possess the full common-law power of their state counterparts, . . . the cases cited . . . nonetheless indicate that the fashioning of remedies for wrongs has traditionally been a part of the business of the federal courts."

none could be implied under the strict *Touche Ross* standard. The different treatment the two standards accord to the policies and objectives of federal statutes may provide an answer. While *Touche Ross* made it clear that a federal statute's objectives and policies would no longer support the implication of a new right, none of the federal common law cases examined earlier addressed this issue directly. Moreover, as the Court stated in both *Texas Industries* and *Boyle*, federal courts do have the authority to fashion law when state law conflicts with a federal statute's policy or objective or when uniformity is necessary to protect the rights and duties of the United States.

Thus, one cannot fault courts, such as *Barany* and *Rosenberg*, which, in their eagerness to provide relief, resort to examining the statute's legislative histories for policies or objectives that would be frustrated were state law to apply. From this perspective, the federal courts' misunderstanding of their powers to fashion law results from the Supreme Court's failure to define the few federal objectives that constitute uniquely federal interests when the rights and duties of the United States are involved or to articulate clearly the prohibition against creating new rights of action by means of federal common law.

This Comment has highlighted the important role that comprehensive remedial schemes play in deciding whether a right of action can be implied from a federal statute or created under federal common law in either instance where the courts have authority to make law (that is, when the power derives from a grant of Congress or is founded on the presence of a uniquely federal interest). It has also shown the significance of comprehensive remedial schemes in determining whether federal common law is preempted by legislation in the field. In situations where any of the above factors presents the possibility of lawmaking, the Court has established that comprehensive remedial schemes nullify the federal courts' already attenuated power to formulate law.

This Comment has also delineated the conditions under which federal courts can fashion federal common law. To recapitulate, federal courts can fashion law when they find that a uniquely federal interest is in need of *protection* because application of state law would (1) infringe the rights and duties of the United States, particularly by hampering the operation of a nationwide federal program or (2) threaten the national treasury. But the courts cannot fashion federal common law when the issue does not affect the federal government or calls for the creation of a new cause of action or right. In short, as the Court noted in *Texas Industries,* the instances in which federal courts can engage in lawmaking are rather narrow, but it appears that until the Supreme Court clearly establishes these limits, the lower courts may continue to formulate federal common law without legitimate authority.

For these reasons, this Comment urges the Court to address the role of federal objectives in the fashioning of federal common law as thoroughly as it addressed their role in the implication of rights of action in *Touche Ross*. However, this Comment also urges the Court to reconsider whether the comprehensiveness of remedial schemes *should* play such a key role in delimiting the courts' lawmaking powers when the rights and duties of the United States stem from a congressional act. Considering that Congress in all its wisdom cannot foresee all the various problems and injuries that could arise from even a narrowly worded act, there is strong support for the proposition that courts should be allowed not only to fill the interstices of acts, but also to create rights of action when such rights are required to fulfill the acts' objectives. This power would ensure that valuable federal rights, such as participation in the democratic governance of federal credit unions, are protected despite funding deficits or other contingencies that prevent the appropriate federal agency from resolving conflicts among private parties regarding those rights. It would also ensure that substantial wrongs are not left without redress simply because state law has either been preempted or provides no remedy and the pertinent federal act overlooked the possibility of controversies among private parties and is therefore silent on the matter of private rights of action.

This Comment also urges the Court to consider whether it is appropriate for federal courts, as impartial adjudicators of the disputes before them, to create law, as the Court did in *Boyle*, in favor of one party for the sake of another party when that other party is the United States. Indeed, the proposition that federal courts have the authority to fashion law absent a federal act, but only for the benefit of the Unites States, seems inconsistent with the doctrine of the separation of powers and the Court's own statements regarding the limited lawmaking powers of federal courts. If courts do not have the authority to fill in any hiatus Congress left in the area because lawmaking is Congress's prerogative and the courts should not upset the delicate balance of comprehensive remedial schemes, then whence comes the courts' authority to fashion federal law and displace state law when there is no pertinent federal statute at all? Moreover, the fact that the federal treasury or the rights and duties of the United States would be adversely affected absent such law should not alter the result. As the Court itself has emphasized, the federal courts are in the business of enforcing the law, not setting federal policy. Congress and the Executive Branch are the legitimate watchdogs[273] of the national purse, not the federal courts.

It would therefore seem, contrary to the decision reached in *Boyle*, that if the federal courts have any authority to fashion law when the rights and duties of the United States are implicated, it should be pursuant to federal acts and be irrespective of the nature of the parties involved. The former limitation would ensure that courts that fashion law are guided and limited by the act's objectives. The latter limitation would ensure that the federal rights of private parties are fully vindicated and that the United States and affiliated parties would receive no special privilege by way of federal common law that is not authorized and sanctioned by Congress. The need for uniform law to protect nationwide federal programs would still provide the courts with the authority to engage in interstitial lawmaking. The courts would also continue to have authority to fashion federal common law in the absence of legislation when the conflict involves other types of uniquely federal interests, such as interstate and international disputes and admiralty cases.

RAQUEL MARIA PRIEGUEZ

273. They may not be Dobermans but the back yard is theirs to guard.