Defining State Law According to State Court Results: The Arizona Contributory Negligence Rule in Federal Torts Claims Act Cases

John R. Hannah

The federal courts frequently apply state law as a federal rule of decision. In some instances, a federal statute specifies that state law will serve as the rule of decision in cases brought under that statute.[1] At times the federal courts themselves choose state law to decide issues of federal law, exercising their power to create "federal common law."[2] Most commonly, the federal courts decide cases within their diversity of citizenship jurisdiction according to the law of the state in which the court sits.[3]

In each situation, the court confronts two interrelated issues. It must decide which issues in the litigation before it are controlled by state law. The result varies depending on whether the Constitution, a particular statute, or federal common law principles require application of state law as

1. Leading examples of such statutes are the Federal Tort Claims Act, which determines the liability of the United States by reference to state law, 28 U.S.C. §§ 1346(b), 2672 (1982); and 42 U.S.C. § 1988 (1982), which directs the federal courts to look to state law to provide rules of decision when federal law lacks appropriate rules or does not furnish suitable remedies. *See* Moor v. County of Alameda, 411 U.S. 693 (1972). The federal bankruptcy laws also refer the federal court to state law on a number of issues that arise in bankruptcy actions. *See generally* 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE P. 0.322(1) (2d ed. 1981).

2. For a discussion of the federal courts' authority to make federal common law in areas that are "essentially of federal concern," see United States v. Standard Oil Co., 332 U.S. 301, 305-11 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943). Both decisions point out that the courts may select state law as the applicable federal rule, although the Supreme Court decided that a uniform federal rule was more appropriate in the cases presented. *Standard Oil*, 332 U.S. at 308-11 (liability to United States of tortfeasor who caused injury to a soldier); *Clearfield Trust*, 318 U.S. at 367 (liability of holders of United States commercial paper). For decisions in which the Court settled an issue of federal law by reference to state law, see United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (priority of liens under two federal loan programs); De Sylva v. Ballentine, 351 U.S. 570 (1956) (meaning of "children" under the federal copyright statute).

Where state law is incorporated into federal law by judicial decision, the court has some latitude to determine its terms. By contrast, the court must interpret state law incorporated by federal statute in accordance with the terms of the statute. "[O]nce 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." Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 95 n.34 (1981) (citations omitted).

3. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

the federal decisional rule.[4] Once the court concludes that state law controls, it must ascertain exactly what the state law is and how it can be given effect in a federal tribunal. In some instances, state law may not provide a clear rule of decision or it may not address an issue at all. In such cases, the federal judge selects a governing rule by determining how the highest state court would decide if it faced the issue.[5]

In Federal Tort Claims Act[6] cases in Arizona, a unique contributory negligence rule raises both the issue of whether to adopt state law and the issue of how to define it. The Federal Tort Claims Act (FTCA), which permits tort actions against the United States based on the wrongful conduct of federal employees, generally adopts state tort law to determine federal liability.[7] Arizona tort law allows the jury to award damages to a contributorily negligent plaintiff at its discretion.[8] The FTCA, however, requires trial to the court without a jury;[9] therefore, the federal court cannot rely on a jury to define the rights of the litigants in cases involving contributory negligence, as an Arizona state court would. Sitting without a jury, the federal courts in Arizona have not permitted contributorily negligent plaintiffs to recover damages from the government.[10]

This Note argues that Arizona's federal courts should adopt the Arizona contributory negligence rule in Federal Tort Claims Act cases despite the absence of a jury, thereby permitting recovery by contributorily negligent plaintiffs. The first section of the Note describes how the Arizona constitutional provision requiring the jury to decide the contributory negligence issue has developed into a substantive contributory negligence rule. The next section discusses the FTCA principle that state laws that govern the liability of private individuals should also determine federal liability, and explores the conflict between the Arizona contributory negligence rule and the FTCA's denial of the right to jury trial. The Note argues that the courts should not construe the FTCA jury trial provision to deprive a contributorily negligent plaintiff of substantive rights conferred by Arizona law. The final section of the Note considers how the federal courts can ascertain exactly what rights Arizona law gives a contributorily negligent plaintiff in a particular case. It proposes several methods of approximating the result that an Arizona court might reach by submitting the contributory negligence issue to a jury.

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4. *See* Southern Pac. Transp. Co. v. United States, 462 F. Supp. 1193, 1198-1200 (E.D. Cal. 1978), which summarizes the general principles by which federal courts choose what law to apply. That choice depends on the particular source of controlling principles, not on the basis of the court's jurisdiction. *Id.* at 1200. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 387-89 (4th ed. 1983). For a brief discussion of this analysis in the context of the Federal Tort Claims Act, *see infra* notes 58-63 and accompanying text.

5. *See infra* notes 118-121 and accompanying text.

6. 28 U.S.C. §§ 1346(b), 2402, 2671-2680 (1982).

7. 28 U.S.C. § 1346(b). For the text of this provision, *see infra* note 72.

8. *See infra* section I.

9. 28 U.S.C. § 2402. For the text of this provision, *see infra* text accompanying note 94.

10. *See infra* notes 54-57 and accompanying text.

I. THE ARIZONA CONTRIBUTORY NEGLIGENCE DOCTRINE

Article 18, section 5 of the Arizona Constitution provides that "[t]he defense of contributory negligence or of assumption of risk, shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."[11] On its face, this provision appears merely to shift the responsibility for applying the contributory negligence rule from the judge to the jury. As interpreted by the courts, however, article 18, section 5 also permits the jury to decide what contributory negligence rule to apply. In any given case, Arizona juries have the power to decide that a plaintiff's contributory negligence will not prevent him from recovering damages.[12] By granting the jury such latitude, Arizona's legislative and judicial policymakers have given effect to a substantive tort policy which rejects the common law notion of contributory negligence as an absolute bar to recovery and imposes rights and liabilities resembling those expressed in a rule of comparative negligence.[13]

The framers of the Arizona Constitution adopted article 18, section 5 to protect the rights of industrial workers whose jobs exposed them to the risk of injury.[14] The debate at the Arizona Constitutional Convention suggests that the delegates sought to limit the availability of the defenses of contributory negligence and assumed risk, in order to force employers to take greater precautions for the safety of their employees.[15] The Convention borrowed article 18, section 5 from the Oklahoma Constitution[16] and adopted it as a compromise between delegates who wished to restrict the common law defenses radically and those who were unwilling to abandon them.[17] Since the provision as enacted does not by its terms alter the law of contributory negligence and assumed risk, whether the Convention intended changes in the substantive law is not clear.[18] The drafters, how-

11. ARIZ. CONST. art. 18, § 5. The interpretation of this provision as a rule of substantive law is discussed in Note, *Contributory Negligence—Confusion Out of Compromise*, 13 ARIZ. L. REV. 556 (1971) [hereinafter cited as *Confusion Out of Compromise*]; and Note, *Arizona Constitutional Law Derailed in Federal Diversity Court: A Reevaluation of Herron v. Southern Pacific Co.*, 16 ARIZ. L. REV. 208, 210-16 (1974) [hereinafter cited as *Arizona Constitutional Law Derailed*].

Although this Note will discuss article 18, section 5 as a rule of contributory negligence, the provision also applies to cases involving assumption of risk. Chavez v. Pima County, 107 Ariz. 358, 361, 488 P.2d 978, 981 (1971). The analysis of this Note applies where assumption of risk is an issue in an FTCA action.

12. *See infra* notes 25-39 and accompanying text.

13. *See infra* notes 44-45 and accompanying text.

14. *See* COMPLETE VERBATIM REPORT OF THE ARIZONA CONSTITUTIONAL CONVENTION, December 5, 1910 (morning session) p. 3. Although the provision was addressed to the issue of employer liability and included in the Labor section of the Constitution, the Arizona Supreme Court soon held that the rule applies to all tort litigation. Davis v. Boggs, 22 Ariz. 497, 507, 199 P. 116, 120 (1921).

15. *See* COMPLETE VERBATIM REPORT, December 5, 1910 (morning session) pp. 3-4.

The original proposal to the Convention—Proposition 88, section 2—would have abolished the assumption of risk defense entirely and placed the burden of proving contributory negligence on the defendant. Opponents of this proposal argued that it went too far toward imposing responsibility for workers' injuries on employers. *See* COMPLETE VERBATIM REPORT, December 5, 1910 (morning session) pp. 2-6.

16. OKLA. CONST. art. 23, § 6.

17. *See* COMPLETE VERBATIM REPORT, December 5, 1910 (morning session) pp. 2-6. *See generally Confusion Out of Compromise, supra* note 11, at 562-63.

18. It has been suggested that article 18, section 5 was designed to protect injured plaintiffs

ever, plainly intended to foster recoveries by allegedly negligent plaintiffs and accordingly to increase the concern of industrial employers for their workers' well-being.[19]

The Arizona courts initially interpreted article 18, section 5 as a reallocation of "the respective functions of courts and juries in determining contributory negligence,"[20] not as a modification of the parties' substantive rights. The courts held that the provision gave juries the power in all cases to decide whether the evidence demonstrated contributory negligence.[21] The cases characterized the jury as having discretion "to determine whether, as a matter of law or fact, the evidence shows such contributory negligence to exist."[22] If the evidence proved contributory negligence, however, the law still required the jury to adhere to the common law rule that barred the plaintiff from recovery.[23] The courts gave jury instructions that mandated a verdict for the defendant if the jury found contributory negligence.[24]

Layton v. Rocha[25] indicated for the first time that article 18, section 5

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from judges who abused their power to direct or set aside verdicts for the benefit of industrial employers. *See* Varela v. Reid, 23 Ariz. 414, 418-19, 204 P. 1017 (1922); *Arizona Constitutional Law Derailed*, *supra* note 11, at 210-11. To the extent that this view is correct, the rule originally was procedural rather than substantive. The record of the Constitutional Convention, however, does not reveal any discussion of the problem of judicial abuse of discretion. The compromise language was proposed at the end of a long debate over who should bear the risk of injury to an employee and adopted without further deliberation. *See* COMPLETE VERBATIM REPORT, December 5, 1910 (morning session) pp. 5-7.

19. In this sense, the Arizona rule represents an exercise of the state's fundamental power to enact laws that "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). Since a federal court deciding a Federal Tort Claims Act claim is not exercising diversity jurisdiction, it is not bound by the considerations of federalism that led Justice Harlan in *Hanna* to conclude that a federal diversity court is constitutionally required to apply such state laws. *See infra* notes 58-63 and accompanying text. The FTCA, however, is intended to impose on the federal government the same responsibilities that a private individual accepts. Therefore, the fact that article 18, section 5 is among the Arizona laws that define private responsibility for tortious acts indicates that the court should seek a method of applying it in an FTCA action. This issue is discussed *infra* at Section II.

20. Varela v. Reid, 23 Ariz. 414, 418-21, 204 P. 1017,1019-20 (1922).

21. *See, e.g.*, Campbell v. English, 56 Ariz. 549, 554-55, 110 P.2d 219, 221 (1941); Dennis v. Stukey, 37 Ariz. 299, 304-05, 294 P. 276, 278 (1930); Inspiration Consol. Copper Co. v. Conwell, 21 Ariz. 480, 486-87, 190 P. 88, 90-91 (1920). Thus, the court may not grant a new trial on the ground that the verdict was contrary to the evidence on the contributory negligence issue. *E.g.*, *Inspiration Consol.*, 21 Ariz. at 486, 190 P. at 90-91. Similarly, the trial court may not direct a verdict for the defendant on the basis of the plaintiff's contributory negligence. *E.g.*, Salt River Valley Water Users' Ass'n v. Berry, 31 Ariz. 39, 47, 250 P. 356, 358 (1926). These rules remain the law of Arizona.

22. *Campbell*, 56 Ariz. at 555, 110 P.2d at 221. The contributory negligence issue goes to the jury even in cases in which, under the common law rules, undisputed evidence of contributory negligence would make the question one of law for the court. *Id.* at 554-55, 110 P.2d at 221.

23. *See Campbell*, 56 Ariz. at 554, 110 P.2d at 221; Herzberg v. White, 49 Ariz. 313, 320, 66 P.2d 253, 256-57 (1937); *Varela*, 23 Ariz. at 421-22, 204 P. at 1020.

24. *See* General Petroleum Corp. v. Barker, 77 Ariz. 235, 242, 269 P.2d 729, 733 (1954) (approving a jury instruction which stated that a finding of contributory negligence would bar the plaintiffs' recovery). Although the courts instructed the jury to observe the common law rule, they could not compel the jury to follow the law by the usual devices of directed verdict and new trial. *See supra* note 21. For example, in Dennis v. Stukey, 37 Ariz. 299, 294 P. 276 (1930), the appellate court found itself unable to grant the defendant a new trial even though "[t]he law [of contributory negligence] as given to the jury was ignored." *Id.* at 304-05, 294 P. at 278.

25. 90 Ariz. 369, 368 P.2d 444 (1962).

requires Arizona juries to determine not only the existence of contributory negligence but also its legal consequences.[26] Under the *Layton v. Rocha* doctrine, the trial court should instruct the jury on the common law contributory negligence rule,[27] but it may not instruct the jury to return a verdict consistent with that rule.[28] The *Layton* court held that the defendant was not entitled to a jury instruction stating that the verdict "must" be for the defendant if the evidence showed contributory negligence.[29] The preferable form of instruction, according to the *Layton* court, is that in the event of contributory negligence the jury "should" find for the defendant.[30] Since a verdict for the plaintiff is permissible regardless of his negligence, the *Layton* court also tolerated a charge that the jury "may" find for the defendant where the plaintiff has been contributorily negligent.[31]

Subsequent cases have made clear that Arizona juries have absolute discretion to decide the legal consequences of contributory negligence.[32] In *Heimke v. Munoz*,[33] the court held that the jury's authority "includes not alone the right to determine the facts, but to apply or not, as the jury sees fit, the law of contributory negligence as a defense."[34] Since *Heimke*, the cases have assumed that the jury has the prerogative to determine the weight to be given to the plaintiff's contributory negligence,[35] and have focused instead on the question whether a particular jury instruction adequately informs the jury of its discretion.[36] The most recent Arizona Supreme Court case on the subject reversed the *Layton* preference by suggesting that a "may" instruction informs the jury of its function and powers more clearly than a "should" instruction.[37] The court confirmed that the jury has no duty to return a verdict for the defendant when it finds the plaintiff contributorily negligent.[38]

If the jury has no duty to observe the common law rule that contributory negligence prohibits recovery, then the common law rule is no longer

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26. *See id.* at 374-75, 368 P.2d at 447-48 (Jennings, J. dissenting).
27. *See* Rhind v. Kearney, 21 Ariz. App. 570, 571, 521 P.2d 1148, 1149 (1974).
28. *Layton*, 90 Ariz. at 370-71, 368 P.2d at 445.
29. *Id.*
30. "This form more accurately advises the jury of its duty." *Id.* at 371, 368 P.2d at 445.
31. *Id.*
32. *See, e.g.*, Purchase v. Mardian Constr. Co., 21 Ariz. App. 435, 438, 520 P.2d 529, 532 (1974).
33. 106 Ariz. 26, 470 P.2d 107 (1970).
34. *Id.* at 28, 470 P.2d at 109 (emphasis omitted). The court reached this conclusion by examining the language of article 18, section 5. *Id.* at 27, 470 P.2d at 108.

Before *Heimke*, it had been unclear whether the jury's *Layton* responsibility for applying the contributory negligence rule to a particular set of facts included discretion to determine whether or not the rule *should* apply. Rogers v. Mountain States Tel. and Tel. Co., 100 Ariz. 154, 166, 412 P.2d 272, 280-81 (1966), indicated that the jury's function is to decide whether contributory negligence exists, not to decide what the law of contributory negligence is. *See also Confusion Out of Compromise*, *supra* note 11, at 558. In light of *Heimke*, *Rogers* no longer is the Arizona law.

35. Manhattan-Dickman Constr. Co. v. Shawler, 113 Ariz. 549, 555, 558 P.2d 894, 900 (1976).
36. *See, e.g.*, Purchase v. Mardian Constr. Co., Inc., 21 Ariz. App. 435, 520 P.2d 529 (1974); Winchester v. Palko, 18 Ariz. App. 534, 504 P.2d 65 (1972); Anderson v. Gobea, 18 Ariz. App. 277, 501 P.2d 453 (1972).
37. Manhattan-Dickman Constr. Co., 113 Ariz. at 555, 558 P.2d at 900. A "should" instruction is still tolerated. *Id.*
38. *Id. See also* Schmidt v. Gibbons, 101 Ariz. 222, 224, 418 P.2d 378, 380 (1966) (implying that the jury has authority to grant a negligent plaintiff a "legal right" to recover).

the law of Arizona.[39] Rather, the Arizona law is that contributory negligence *may* preclude the plaintiff from recovering damages, at the discretion of the jury. In any particular case, the jury decides whether, and to what extent, the plaintiff's negligent conduct affects his recovery. In each case Arizona law permits a verdict in favor of a contributorily negligent plaintiff.

In *Layton v. Rocha* and its progeny, the Arizona courts have expanded the role of the jury radically. Where contributory negligence is an issue, Arizona juries do not function simply as factfinders, nor have they merely been allocated the judge's usual role of applying rules of law to undisputed facts.[40] Rather, juries in Arizona determine the relative rights of a negligent defendant and a contributorily negligent plaintiff.[41] In effect, juries

39. Some court of appeals decisions assert that Arizona still recognizes the common law contributory negligence rule. In Rhind v. Kearney, 21 Ariz. App. 570, 521 P.2d 1148 (1974), the court reversed a trial court verdict for the plaintiff on the ground that the jury instructions had not informed the jury that contributory negligence prevents recovery. *See id.* at 571, 521 P.2d at 1149. The court stated that "*Heimke* did *not* change the law of contributory negligence in this state. It simply reiterated that it was up *to the jury* to decide whether the doctrine should apply." *Id.* at 570, 521 P.2d at 1148 (emphasis by the court) (citation omitted). To the same effect is De Lozier v. Smith, 22 Ariz. App. 136, 524 P.2d 970 (1974), which held that surviving children could not recover for a decedent's wrongful death, where the decedent's spouse was contributorily negligent and such negligence was a proximate cause of the death. The jury's findings indicated that it had found both the defendant and the surviving spouse negligent. The appellate court reversed the jury's verdict on the theory that, under those circumstances, the law would not have permitted the decedent spouse to maintain the action had she lived.

These decisions make sense only if the jury has a duty to find against a negligent plaintiff. By that reasoning, article 18, section 5 simply denies the defendant an appeal from the jury's decision, regardless of whether the jury has observed the law. That arguably was the Arizona law before *Layton v. Rocha.* Since *Layton,* however, juries have had discretion to find *in favor of* a contributorily negligent plaintiff. *See supra* notes 24-39 and accompanying text. The courts have not merely tolerated jury verdicts for plaintiffs in the face of contributory negligence; they have sanctioned them. *See, e.g., Manhattan-Dickman Constr. Co.,* 113 Ariz. at 555, 558 P.2d at 894 (a "should" jury instruction is not intended "to convey an absolute sense of duty and obligation" to apply the doctrine of contributory negligence); *Heimke,* 106 Ariz. at 30, 470 P.2d at 111 (the jury should be instructed as to the common law contributory negligence rule "so that it may apply the defense if it sees fit").

40. The latter was the jury's pre-*Layton* role. *See supra* notes 20-24 and accompanying text.

41. This interpretation of the Arizona Constitution might be inconsistent with the due process clause of the fourteenth amendment. Due process requires that individuals be given fair notice, in advance, of the legal consequences of their conduct. *Cf.* Grayned v. City of Rockford, 408 U.S. 104,108 n.3 (1972) (collecting cases). In Arizona, the jury lacks any rules or standards to tell it when the contributory negligence doctrine should be applied. Consequently, litigants cannot know what their liability for particular conduct may be until the jury decides that question. Moreover, two identically situated defendants may have different liabilities imposed on them for reasons totally unrelated to their conduct. *See* Vegodsky v. City of Tucson, 1 Ariz. App. 102, 105, 399 P.2d 723, 726 (1965).

Over sixty years ago, the United States Supreme Court, in an opinion by Justice Holmes, held that article 23, section 6 of the Oklahoma Constitution, which is identical to ARIZ. CONST. art. 18, § 5, does not violate the defendant's fourteenth amendment due process rights. Chicago, Rock Island, and Pacific R.R. Co. v. Cole, 251 U.S. 54 (1919). The Court found no constitutional defect in rules that "confer larger powers upon a jury than those that generally prevail." *Id.* at 56. The Court assumed, however, that a court ruling on the contributory negligence issue as a matter of law would have concluded that the plaintiff could not recover. *Id.* at 55. It is impossible even to frame the question that way under Arizona law, because the court has no power to determine the legal consequences of contributory negligence. Furthermore, a negligent plaintiff clearly is entitled to recover in some cases in Arizona. *See supra* notes 24-39 and accompanying text. Therefore, *Cole* arguably does not decide the question whether a state has the authority to permit a jury to create *ad hoc* standards of conduct in specific cases. In fact, some language in the opinion indicates that states do not have such authority: "It is said that legislation cannot change the

become lawmakers who designate the rule of law to apply to the parties before them.[42] They must be informed of the common law contributory negligence rule, but are free to ignore it.[43] Such power to create and apply an *ad hoc* rule of law has no parallel among the usual powers of either judge or jury.

Recognizing that juries often find for a negligent plaintiff but take his negligence into account in awarding damages, courts and commentators have described the Arizona law as a primitive form of comparative negligence.[44] In fact, Arizona law grants the plaintiff greater rights than would a comparative negligence rule because the jury may award the plaintiff a complete recovery despite his fault.[45] Conversely, the jury may deny the plaintiff any recovery if he was contributorily negligent. Thus, no consistent rule governing the rights of a contributorily negligent plaintiff can be identified in Arizona. In every case, however, the plaintiff has an opportunity to recover regardless of his negligence. The same opportunity should be available under the Federal Tort Claims Act to a person injured by the negligence of a government employee.

II. INCORPORATION OF THE ARIZONA CONTRIBUTORY NEGLIGENCE DOCTRINE AS THE FEDERAL TORT CLAIMS ACT RULE OF DECISION

The Federal Tort Claims Act generally waives the federal government's sovereign immunity from ordinary common law tort suits.[46] It permits claims for money damages against the government based on the negligent or wrongful acts of government employees acting within the scope of their employment.[47] Such claims are cognizable in United States district court if a private individual in the same circumstances would be liable under state law.[48] Thus, the government's liability is determined "in accordance with the law of the place where the act or omission

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standard of conduct, which is matter of law in its nature into matter of fact, and this may be conceded. . . ." *Id.* at 55-56.

42. *See* Vegodsky v. City of Tucson, 1 Ariz. App. 102, 105, 399 P.2d 723, 726 (1965). The court noted that "[t]he Layton doctrine casts to twelve persons selected by lot shortly before trial the power to determine what the law will be as to the particular individuals before it." *Id.*

43. *Heimke*, 106 Ariz. at 30, 470 P.2d at 111.

44. *See Confusion Out of Compromise*, *supra* note 11, at 557; State v. Cress, 22 Ariz. App. 490, 495-96, 528 P.2d 876, 881-82 (1974); Layton v. Rocha, 90 Ariz. 369, 373, 368 P.2d 444, 447 (1962) (Jennings, J., dissenting).

Oklahoma's identical constitutional provision, article 23, section 6, has not been interpreted as a rule of substantive law. Until recently, an Oklahoma plaintiff was not entitled to recover when he was contributorily negligent and his negligence proximately caused his own injury. Smith v. Chicago, Rock Island, and Pacific R.R. Co., 498 P.2d 402, 405 (Okla. 1972). Recently Oklahoma adopted a comparative negligence statute, OKLA. STAT. ANN. tit. 23, §§ 13-14 (1983), confirming indirectly that its constitutional provision does not affect the substantive tort law of the state. Since the Oklahoma constitutional provision is merely a procedural rule, it does not create the same problems of application in federal court that the Arizona rule creates.

45. *See Confusion Out of Compromise*, *supra* note 11, at 562.

46. *See* Dalehite v. United States, 346 U.S. 15, 25-26 n.10 (1953).

47. 28 U.S.C. § 1346(b).

48. *Id. See* United States v. Muniz, 374 U.S. 150, 153 (1963); Richards v. United States, 369 U.S. 1, 6-7 (1962) (discussed *infra* text accompanying notes 85-91).

occurred."[49]

The government's liability is not coextensive with private liability, however, because in some instances Congress exercised its power to impose limits and conditions on the sovereign immunity waiver.[50] For example, the FTCA does not cover certain specified types of claims.[51] It does not make the government liable for pre-judgment interest or punitive damages.[52] Most important for purposes of the present discussion, the FTCA does not permit the plaintiff to try his case to a jury.[53] In FTCA actions the court, not a jury, must decide the case.[54]

Apparently no FTCA court has recognized the rule of article 18, section 5 and returned a verdict for a contributorily negligent plaintiff. Few reported decisions discuss the issue. The Ninth Circuit has implied in dictum that the district court, as the trier of fact in an FTCA case, has authority to find for an Arizona plaintiff even though it finds contributory negligence.[55] That same court, however, has held that a driver's contributory negligence bars recovery by the driver, his wife, and his employer under Arizona law.[56] The latter decision did not acknowledge the effect of *Layton v. Rocha* on the common law contributory negligence doctrine.[57]

When a court squarely addresses the question whether to apply the Arizona rule in an FTCA case, it will face a problem of statutory interpretation.[58] Broadly stated, the issue will be whether Congress intended to incorporate the rule of article 18, section 5 into the body of federal substantive law that governs FTCA claims.[59] Such "state law" incorporated by statute as the rule of decision in federal court must be distinguished

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49. 28 U.S.C. §§ 1346(b), 2672.

50. *See Richards*, 369 U.S. at 6, 13-14.

51. 28 U.S.C. § 2680. Congress excluded claims based on an employee's performance of a discretionary function or duty; claims arising from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, deceit, misrepresentation, or interference with contract; claims arising from negligent mail delivery; and numerous others. *Id.*

52. 28 U.S.C. § 2674.

53. 28 U.S.C. § 2402. *See* Carlson v. Green, 446 U.S. 14, 22 (1980); United States v. Neustadt, 366 U.S. 696, 701 n.10 (1961).

54. For the text of 28 U.S.C. § 2402, see *infra* text accompanying note 94.

55. United States v. Cline, 410 F.2d 1337 (9th Cir. 1969). In *Cline*, the court held that the plaintiff's decedent had not been contributorily negligent when he drowned while diving to recover submerged tanks at an Army depot reservoir. *Id.* at 1343. In the course of the opinion, the court set forth its view of the relevant Arizona law regarding contributory negligence: "[a]pparently under Arizona law the trier of fact has authority to find for the plaintiff in a tort action even though there is, and it finds that there is, contributory negligence. [*Layton v. Rocha*]." *Id.* at 1342.

56. Muhammad v. United States, 366 F.2d 298 (9th Cir. 1966), *cert. denied*, 386 U.S. 959 (1967).

57. *Id.* at 302. The only Arizona authority cited on the contributory negligence issue was Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956), a pre-*Layton* case which held that the contributory negligence of one spouse will be imputed to the other spouse to bar recovery. *Id.* The opinion does not reveal any further investigation into the Arizona law of contributory negligence.

58. *See, e.g., Richards*, 369 U.S. at 9-14 (interpreting statutory language to determine the applicable choice of law rules); Massachusetts Bonding and Ins. Co. v. United States, 352 U.S. 128 (1956) (interpreting 28 U.S.C. § 2674 to decide whether a Massachusetts limitation on wrongful death recoveries applies to recoveries against the United States); United States v. Yellow Cab Co., 340 U.S. 543, 547-52 (1951) (interpreting the statute to determine whether the United States may be liable for contribution to a joint tortfeasor). The text discusses each of these cases, *infra*.

59. *Cf.* Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 91 (1981) (existence of implied right of action by employers for contribution from unions

from "state law" operative of its own force in federal diversity cases. Where diversity of citizenship is the basis of federal jurisdiction, state law governs because the federal courts have no authority to make substantive rules regulating the conduct of the parties.[60] The rights and duties of the parties in a diversity case are grounded in state law. Therefore, the federal court is obligated to act in accordance with state law.[61] The rights of persons injured by the torts of federal employees, by contrast, derive from the congressional waiver of sovereign immunity. Without the waiver, those persons would have no right of action. The source of the governing law, then, is the federal legislation which creates the cause of action.[62] That legislation embodies a congressional *choice* of state law as the measure of federal liability. The *Erie* doctrine therefore does not control the question whether a particular state law applies in a suit against the United States.[63] Rather, the court in an FTCA case will have to decide that question by

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under the Equal Pay Act or Title VII of the Civil Rights Act of 1964 ultimately depends on whether Congress intended to create such a right).

60. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). *See* 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, 799 (1957).

61. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108-109 (1945) (". . . [s]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."); C. WRIGHT, *supra* note 4, at 356. Although the decisions since *Guaranty Trust* have limited the notion that the outcome of litigation should be substantially the same in federal and state courts, it remains clear that a diversity court is required to apply state laws that are "bound up with the definition of the rights and obligations of the parties." Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958).

62. 28 U.S.C. §§ 1346(b), 2672. *See* Moor v. County of Alameda, 411 U.S. 693, 701 and n.11 (1973) (Congress adopted state law in the FTCA "to fill the interstices of federal law"); *Richards*, 369 U.S. at 7 (same as *Moor*); Feres v. United States, 340 U.S. 135, 142 (1950) (FTCA "recognizes and assimilates into federal law the rules of substantive law of the several states").

63. *Richards*, 369 U.S. at 7. *Cf.* Levinson v. Dupree, 345 U.S. 648, 651-52 (1953), (*Erie* is not relevant where a federal court enforces state-created rights in admiralty); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943) (*Erie* does not apply where the question is whether state law should be adopted to govern rights of a holder of United States commercial paper).

The courts have not satisfactorily decided how to apply article 18, section 5 of the Arizona Constitution in federal diversity cases. The federal courts have recognized the Arizona rule at least to the extent that they permit permissive jury instructions which allow the jury to decide whether contributory negligence will be a defense in a particular case. *See* Seltzer v. Chesley, 512 F.2d 1030 (9th Cir. 1975). Whether the courts are willing to permit the jury to make that decision in all cases remains unclear. In Herron v. Southern Pac. Co., 283 U.S. 91 (1931), the United States Supreme Court held that the Arizona Constitution does not prevent a federal judge from directing a verdict for the defendant where there is conclusive evidence of contributory negligence or assumption of risk. The Court declared that state laws cannot alter the essential character of a federal court, in which the judge has the duty to decide questions of law. *Id.* at 95-96. Although the federal courts apparently still follow *Herron*, its current validity is doubtful. *Arizona Constitutional Law Derailed*, *supra* note 11, makes a persuasive attack on the federal courts' practice of directing verdicts for defendants on the ground of contributory negligence.

Fortunately, *Herron* does not muddle the problem of applying Arizona law to Federal Tort Claims Act cases. To the extent that *Herron* simply decided whether the Arizona law applies in diversity cases, the issues it raises are irrelevant where a *statute* incorporates state law into federal law. Even if *Herron* decided that the seventh amendment requires preservation of the common law functions of judge and jury in federal court, it does not limit the authority of the judge in an FTCA action because the seventh amendment does not apply to such actions. *See infra* note 95. The judge in an FTCA case determines questions of both law and fact, by authority of the enabling statute. 28 U.S.C. § 2402.

examining the language of the statute, its legislative history, and its construction by the courts.

A. *The Arizona Contributory Negligence Doctrine as a "State Law" Within the Meaning of the Federal Tort Claims Act*

The purpose of the Federal Tort Claims Act was to eliminate private bills as the means of compensating victims of the torts of government employees.[64] Private bills were appropriations of money to settle specific claims against the government. Congress wished to relieve itself of the enormous burden of considering such legislation.[65] Congress also perceived the private bill process as unjust, because the process permitted claimants to recover only as a matter of legislative grace and some legitimate claims went unsatisfied.[66] Thus, the legislators created a cause of action against the government. To remedy the injustice of private bills, they gave a person injured by a government employee's tort the same rights that he would have against a private individual in a similar situation.[67] The statute expresses this policy: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."[68]

To match government responsibility for wrongful conduct with private responsibility for such conduct, the FTCA borrows state law to measure the government's liability. As originally proposed, the FTCA provided for liability "to the same extent and in the same manner as a private individual," but also included specific substantive provisions that would have created some uniform federal liability rules.[69] Subsequent

64. *See Yellow Cab Co.*, 340 U.S. at 549-50 (citing S. REP. No. 1400, 79th Cong., 2d Sess. 29 (1946)). A companion provision prohibited the introduction of private bills. *Id.* The provision banning private bills is now codified at 2 U.S.C. § 190(g) (1982).

65. S. REP. No. 1400, 79th Cong., 2d Sess. 32 (1946); H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945); H.R. REP. No. 2245, 77th Cong., 2d Sess. 5 (1942); H.R. REP. 2428, 76th Cong., 3d Sess. 2 (1940).

Although the statute was enacted in 1946, the legislative hearings on the 1940 and 1942 versions of the Act are the most useful sources of legislative history because little additional discussion of the measure took place when Congress finally enacted it. *See* Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 535 n.10 (1947). *But see* United States v. Yellow Cab Co., 340 U.S. 543, 550 n.9. The various House and Senate bills introduced in 1940 and 1942 closely resemble the present statute; S.2221, which passed the Senate but did not reach the floor of the House in 1942, is nearly identical to it. *Id.*

66. *See* legislative history *supra* note 65. *Muniz*, 374 U.S. at 154; Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955). Each of the congressional reports affirms that the Act was intended to alleviate the unfairness of recovery as a matter of grace rather than right. *See* legislative history *supra* note 65.

67. "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." Indian Towing Co. v. United States, 350 U.S.at 68-69. *See also Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 16, 34 (1940) (testimony of Alexander D. Holtzoff, Special Assistant to the Attorney General).

68. 28 U.S.C., § 2674.

69. *See* §§ 201, 302, 306 of H.R. 7236, *reprinted in 1940 House Hearings*, *supra* note 67. Among the specific provisions was one which would have made contributory negligence a complete defense in all cases. *Id.* § 302.

versions of the bill, however, were stripped of those specific provisions.[70] Instead, Congress decided that claims against the government would be adjudicated entirely according to local law. The bill specified that the district court would have jurisdiction "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death *in accordance with the law of the place where the act or omission occurred.*"[71] Congress adopted that language in 1946 when it enacted the Federal Tort Claims Act as part of the Legislative Reorganization Act.[72]

The courts have construed the FTCA liberally.[73] They read the statutory provisions in the light of the policies underlying the Act.[74] Since the statute was intended to provide relief to those injured by the wrongful conduct of government employees, the courts interpret it to permit recovery whenever possible.[75] Thus, state laws that would permit an action to go forward in state court will be implemented in FTCA actions as well, unless the Act clearly provides otherwise.

The liberal approach is reflected in Supreme Court decisions regarding application of state law under the FTCA. In *United States v. Yellow*

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70. *See, e.g.*, S. REP. No. 1400 at 32; H.R. REP. No. 1287 at 4-5; H.R. REP. No. 2245 at 2-3. The statute as enacted contains exceptions to the general rule of government liability "in the same manner and to the same extent" as private liability. *See supra* notes 50-54 and accompanying text. The exceptions that remain, however, either exclude whole categories of potential claims or limit the claimant's remedies. *Id.* If a claim is cognizable under the Act, all of the rules that determine whether or not the government is liable for that claim are incorporated from state law.

71. Section 301 of H.R. 6463, *reprinted in Tort Claims: Hearings on H.R. 5373 and 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 2-3 (1942) (emphasis added). The language of Section 301 was intended to make explicit that local law would govern suits against the government. *See id.* at 26, 30 (testimony of Assistant Attorney General Francis M. Shea); S. REP. No. 1196, 77th Cong., 2d Sess. 6 (1942). *See also* Note, *The Federal Tort Claims Act*, *supra* note 65, at 553-54 n.125.

72. Pub. L. No. 79-601, 60 Stat. 812, 842 (1946). The original statute read, in pertinent part:

> . . . the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances.
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> . . .

United States v. Aetna Casualty and Sur. Co., 338 U.S. 366, 369-70 (1949). This provision has now been divided and recodified at 28 U.S.C. §§ 1346(b), 2674. The fact that it originally was included as a single provision, however, supports the inference that state law was adopted as a means to the end of subjecting the United States to liability "in the same manner and to the same extent as a private individual."

73. This approach is contrary to the general principle that a waiver of sovereign immunity will be narrowly construed. *See* United States v. Mitchell, 445 U.S. 535 (1980); United States v. Sherwood, 312 U.S. 584 (1941).

74. Justice Harlan pointed out that the terms of the Act should be interpreted "within the wider context of the purpose of the Tort Claims Act as a whole." *Massachusetts Bonding and Ins. Co.*, 352 U.S. at 134 (Harlan, J., concurring). *Massachusetts Bonding* is discussed *infra* at text accompanying notes 107-113. *See also Richards*, 369 U.S. at 10 (the Act must be interpreted "with due regard to the variant interests and policies expressed by the . . . legislation.")

75. *E.g.*, *Muniz*, 374 U.S. at 165; *Aetna Casualty & Sur. Co.*, 338 U.S. at 383.

Cab Co.,[76] for example, the Court permitted a private party to pursue a claim under state law for contribution from the United States.[77] The Court noted the broad statutory language waiving the government's immunity from suit on "any claim against the United States . . . on account of personal injury,"[78] and pointed out that none of the several specific exemptions from the immunity waiver covered claims for contribution.[79] The Court also discussed the FTCA's legislative history, concluding that "it is inconsistent [with the broad scope of the Act] to whittle it down by refinements."[80]

Similarly, the Court in *Rayonier Inc. v. United States*[81] permitted a suit against the government for damages resulting from Forest Service negligence in fighting a fire. The Court held that the government would be liable if state law imposed liability on private persons under similar circumstances.[82] The government's argument that the United States should not be responsible for negligent firefighting, because municipal corporations generally are not responsible for such negligence, was rejected as inconsistent with the plain language of the statute.[83] *Rayonier* reiterated that courts should not read into the Act exceptions beyond those created by Congress.[84]

Richards v. United States[85] further illustrates how the Court has made an effort to implement rules of state law under the FTCA, in keeping with the policy of granting claimants the same right to recover from the United States as exists against private individuals. In *Richards*, an allegedly negligent act by the Federal Aviation Agency in Oklahoma caused an airplane crash in Missouri.[86] The issue was what law the district court should apply. The Court acknowledged the intimate relationship of the FTCA as a whole to state law.[87] Accordingly, the Court held that the entire law of "the state where the act or omission occurred," including conflict of law rules, applies where a tortious act that occurs in one state causes death or injury in another state.[88] A persuasive factor in the decision was that the Court's interpretation "enable(s) the federal courts to treat the United States as an individual would be treated under like circumstances."[89] Moreover, the Court noted that choice of law is not among the areas in

76. 340 U.S. 543 (1951).
77. *Id.* at 552.
78. *Id.* at 548.
79. *Id.*
80. *Id.* at 549-50.
81. 352 U.S. 315 (1957).
82. *Id.* at 318.
83. *Id.* at 319.
84. *Id.* at 320.

For another decision broadly construing the Act to equate government and private liability, see Indian Towing Co. v. United States, 350 U.S. 61 (1955), in which the government was held liable for negligent operation of a lighthouse because a private individual would have been liable under like circumstances, even though no private individuals actually perform the "uniquely governmental function" of operating a lighthouse.

85. 369 U.S. 1 (1962).
86. *Id.* at 3.
87. *Id.* at 11.
88. *Id.* at 11-12.
89. *Id.* at 12.

which Congress specified that state law does not govern federal liability.[90] Absent a clear indication that a federal choice of law rule should be created, the Court declined to create one.[91]

The principles expressed in the FTCA and in the cases that interpret it compel Arizona's federal court to try to implement the Arizona contributory negligence rule in FTCA cases. Arizona no longer follows the common law contributory negligence doctrine. Rather, the rule of article 18, section 5 permits the plaintiff to recover despite his contributory negligence.[92] Therefore, the Arizona rule is a "law of the place" which determines private liability, in the same sense that a state rule governing contribution or choice of law determines private liability. When the Arizona law is characterized as a form of comparative negligence, it becomes plain that the federal courts should apply it to determine the liability of the United States.[93] Moreover, recognition of the Arizona rule would promote the FTCA's policy of giving tort victims the same rights against the government as they would have against a private individual under similar circumstances. The current practice of denying relief to contributorily negligent claimants treats the government more favorably than a similarly situated private defendant would be treated. In effect, the federal courts have created a contributory negligence rule that prevents relief where the state rule might permit it. Such unfavorable treatment of those who happen to be injured by government negligence is inconsistent with the broad remedial purpose of the FTCA.

B. *The Conflict Between the Federal Denial of Jury Trial and the Arizona Contributory Negligence Doctrine*

The FTCA jury trial provision apparently has prevented the incorporation of Arizona's constitutional contributory negligence rule as the rule of decision in FTCA cases. The statute specifies that "[a]ny action against the United States under section 1346 shall be tried by the court without a jury."[94] Thus, the plaintiff in an FTCA case is not entitled to have a jury decide whether, or to what extent, he should recover.[95] In Arizona, how-

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90. *Id.* at 13-14.

91. *Id. See also* Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978), in which the court said:

> Moreover, by adopting the "law of the place" as the source for rules of decision under the Federal Tort Claims Act, Congress expressly negated any possible inference that federal courts were to exercise any "common law-making" power to fashion torts under the Act in the interest of national uniformity.

Id. at 327-28.

92. *See supra* notes 24-45 and accompanying text.

93. State comparative negligence rules govern FTCA suits arising in comparative negligence jurisdictions. *E.g.*, Rudelson v. United States, 602 F.2d 1326 (9th Cir. 1979); Mattschei v. United States, 600 F.2d 205 (9th Cir. 1979); Gilsoul v. United States, 347 F.2d 730 (7th Cir. 1965). The United States is liable to the same extent as a private individual under similar circumstances, even where state law does not limit a defendant's liability to his "comparative" portion of responsibility for an injury. *Mattschei*, 600 F.2d at 209.

94. 28 U.S.C. § 2402.

95. A number of lower federal courts have considered the question of whether the FTCA's failure to provide for a jury trial violates the seventh amendment. All of those courts have concluded that the seventh amendment right to a jury trial does not apply to FTCA actions. *E.g.*, Birnbaum v. United States, 588 F.2d 319, 335 (2d Cir. 1978); Gustafson v. Peck, 216 F. Supp. 370,

ever, *only* the jury can decide whether the plaintiff should recover when there is evidence of contributory negligence.[96] Arizona relies on the jury's decision to measure the defendant's liability. This state practice collides with the federal policy that juries should not determine the liability of the United States.[97]

Although the legislative history of the FTCA does not reflect much discussion of the right to a jury trial,[98] two reasons appear for the decision not to allow jury trials. The more frequently expressed reason was that Congress has permitted non-tort claims against the government in the Court of Claims and in district court under the Tucker Act only on the condition that they be tried without a jury.[99] Some congressmen also feared that juries in FTCA cases would be likely to subject the federal government to extravagant verdicts.[100]

The FTCA jury trial provision reflects Congress' belief that juries are irresponsible decisionmakers which award some plaintiffs more than they are entitled to recover. By eliminating the litigant's right to have a jury decide his claim, Congress attempted to avoid such results. In effect, the jury trial provision creates an exception to the general FTCA rule of government liability "in the same manner and to the same extent" as private

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371-72 (N.D. Iowa 1963); Glasspool v. United States, 190 F. Supp. 804 (D. Del. 1961). A tort action against the sovereign is not a "suit at common law" within the meaning of the seventh amendment. *Birnbaum*, 588 F.2d at 335; *Glasspool*, 102 F. Supp. at 807. Moreover, the sovereign may impose any conditions it wishes on its consent to be sued, including the condition that suits be tried to the court. *Glasspool*, 102 F. Supp. at 806-07. *Cf.* McElrath v. United States, 102 U.S. 426 (1880). *But see* Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 TEXAS L. REV. 549 (1980), which criticizes *McElrath* and argues that the seventh amendment requires recognition of a right to jury trial under the FTCA.

96. *See supra* notes 11-45 and accompanying text.

97. By referring to the policies expressed in the statute, the federal courts determine whether a particular state law is incorporated as the FTCA rule of decision. *See supra* notes 58-63 and accompanying text; notes 73-91 and accompanying text. Implicit in that analysis is the notion that an FTCA court should reject state laws that clearly are inconsistent with statutory policies.

The federal civil rights statutes explicitly require the courts to consider whether state law incorporated by statute as a federal rule of decision is "inconsistent with the Constitution and the laws of the United States. . . ." 42 U.S.C. § 1988. Under those statutes, the state law applies where federal law does not provide a suitable rule of decision, *except* when it is "inconsistent with the federal policy underlying the cause of action under consideration." Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980) (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975)); Robertson v. Wegmann, 436 U.S. 584, 590 (1978). The court must compare the state and federal policies embodied in the respective laws to ascertain whether the laws are consistent. Board of Regents v. Tomanio, 446 U.S. at 487.

98. *See* Kirst, *supra* note 95, at 581-82.

99. MR. O'HARA: Right along with same line, it is my understanding that title III prohibits the trial by jury of these cases. What is the reason for that?

MR. SHEA: The district courts passing on claims against the United States under the Tucker Act of March 3, 1887 are required by the statute to try the case without a jury. They are sitting in these cases as a court of claims and exercising court of claims jurisdiction.

1942 House Hearings, *supra* note 71, at 21 (testimony of Assistant Att'y Gen. Shea). *See also 1940 House Hearings*, *supra* note 67, at 20 (testimony of Mr. Holtzoff); S. REP. No. 1400, 79th Cong., 2d Sess. 32 (1946); H.R. REP. No. 2187, 79th Cong., 1st Sess. 4 (1945).

100. *1940 House Hearings*, *supra* note 67, at 20 (testimony of Mr. Holtzoff). *See* 92 CONG. REC. 10092 (1946) (remarks of Rep. Scrivener); 86 CONG. REC. 12028 (1940) (remarks of Rep. Celler). Courts discussing the FTCA jury trial provision commonly cite this reasoning. *E.g.*, City of Pittsburgh v. United States, 359 F.2d 564 (3d Cir. 1965).

liability.[101] To the extent that decisions by juries vary from decisions by judges, the United States is liable in tort in a *different* manner and to a *different* extent than private individuals under similar circumstances.[102]

The statutory denial of jury trial, however, does not modify the general FTCA principle that federal judges must refer to state law to decide FTCA claims. The jury trial provision merely expresses a legislative policy judgment that juries should not assess the liability of the government, it modifies litigants' procedural rights accordingly. It does not provide the substantive standards against which the court measures government liability. The statutory provisions that incorporate state law provide substantive rules of liability.[103] In accordance with the FTCA's broad policy of providing a remedy for the tortious conduct of government employees,[104] the courts have applied state laws despite arguable procedural objections, where the procedural obstacle blocks the plaintiff from obtaining relief that state law otherwise would grant.[105] If procedures can be adapted to comply with the terms of the FTCA, procedural objections should not defeat the plaintiff's recovery.[106]

The problem of wrongful death damages under the FTCA illustrates how a court should approach a conflict between state laws that define private liability and an FTCA policy that specifies the terms on which the United States may be sued. In some states, wrongful death statutes permit survivors to recover only punitive damages.[107] When Congress first enacted the FTCA, the United States argued that it was not liable for wrongful death in those states because the federal statute prohibits punitive damage awards.[108] To address that problem, Congress amended the FTCA to provide for recovery of "actual or compensatory damages" where state law provides only punitive damages.[109] In *Massachusetts*

101. *See* Richards, 369 U.S. at 13-14 and n.28 (discussed *supra* text accompanying notes 85-91). During the Congressional deliberations, at least one representative recognized that the jury trial provisions represented a departure from the effort "to put the United States Government on an equal footing in the claims against it with the citizens." *1940 House Hearings, supra* note 67, at 20 (remarks of Rep. Robsion).

102. *Cf. Massachusetts Bonding Co.*, 352 U.S. at 135-36 (Harlan, J., concurring). *Massachusetts Bonding Co.* is discussed *infra* text accompanying notes 107-113.

In a diversity case involving a contract arbitration provision, the Court recognized that the right to jury trial was one factor that could make the result of trial in a court of law "radically different" from the result of arbitration. Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956).

103. *See supra* notes 69-72 and accompanying text.

104. *See supra* note 75 and accompanying text.

105. *See* Dalehite v. United States, 346 U.S. 15, 31-32 (1953), and cases cited therein.

106. *Id.*

The Court has rejected an argument that procedural problems associated with impleader of the government as a third-party defendant should preclude application of the FTCA to contribution actions. United States v. Yellow Cab Co., 340 U.S. 543, 555-57 (1951). The Court suggested several procedures to alleviate the problems of a joint trial involving the United States and a private defendant while still permitting the action to go forward. *Id.*

107. Geohagan v. General Motors Corp., 291 Ala. 167, 279 So. 2d 436 (1973) (interpreting ALA. CODE § 6-5-410 (1975)); Act of June 14, 1949, ch. 427, 1949 Mass. Acts 365 (repealed 1958).

108. *Massachusetts Bonding Co.*, 352 U.S. at 130-31.

109. 28 U.S.C. § 2674 provides in pertinent part:

> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compen-

Bonding and Insurance Company v. United States, the Supreme Court indicated that the FTCA amendment had substituted a federal measure of damages for the impermissible state measure, but had not changed the general rule that local law determines the existence of liability.[110] One can infer from that result that other provisions of the FTCA already had established a right to recover for wrongful death in accordance with state liability rules even where state law permitted only punitive damages.[111] In other words, the federal policy against punitive damages did not exempt the United States from liability where state law permitted only punitive damages. On the contrary, it prompted Congress to create a federal damages rule to give effect to state laws that impose liability.[112]

Similarly, the FTCA jury trial provision does not prevent a federal court from adopting the Arizona contributory negligence rule in FTCA cases, to the extent that the Arizona rule establishes substantive rights. Obviously the Arizona rule is closely related to the right to jury trial. In any particular Arizona state court action, the jury decides whether a contributorily negligent plaintiff will recover.[113] The jury's decision, however, does not "create" the plaintiff's right to recover. Rather, the Arizona Constitution gives the plaintiff that right by requiring the court to leave the contributory negligence issue to the discretion of the jury.[114] A person injured by the wrongful conduct of a government employee should have the same opportunity to recover that the Arizona plaintiff would have. The FTCA's denial of the right to jury trial cannot be construed to defeat the general FTCA policy simply because a jury would determine the litigant's rights in Arizona state court. Instead, the federal statute should be construed broadly to permit recovery despite the procedural problem raised by the absence of a jury.[115] Congress certainly did not intend that the jury trial provision, which is based on the notion that juries should not be allowed to expose the United States to unwarranted verdicts, would preclude the federal court from reaching a result that Arizona law encourages a jury to reach.

Once a district court recognizes that contributory negligence does not bar recovery in a Federal Tort Claims Act case in Arizona, it will confront the further problem of determining the parties' rights in a given case. The inquiry will be awkward, because in Arizona state court the rights of the parties are inseparable from the manner of determining them. The rule of

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satory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

110. *See* 352 U.S. at 134. On this reasoning, the Court held a state statutory limit on punitive damage awards inapplicable under the FTCA. *Id.*

111. Such an inference is also supported by the Court's conclusion in *Massachusetts Bonding* that the amendment was intended to change the measure of damages for wrongful death, not merely to permit wrongful death recoveries. 352 U.S. at 132.

112. Similarly, the federal courts can create rules to govern FTCA cases, exercising their broad power to interpret and implement federal statutes. The possibility of a specific federal rule to implement the Arizona law of contributory negligence is discussed *infra* notes 118-134 and accompanying text.

113. *See supra* note 11 and accompanying text.

114. *See supra* notes 25-45 and accompanying text.

115. *See supra* notes 103-13 and accompanying text.

article 18, section 5 provides a contributorily negligent plaintiff no right to recover except as the jury in its discretion may grant. When the United States is the defendant, however, the federal court cannot permit a jury to decide the contributory negligence issue.[116] The court, then, has to find a method of giving effect to the Arizona law that contributory negligence does not defeat the plaintiff's claim, without violating the federal policy that only the court may assess the government's liability.

III. DEFINING THE ARIZONA LAW OF CONTRIBUTORY NEGLIGENCE IN FEDERAL COURT

To decide a case according to state law, the federal court must identify the relevant state law rules.[117] Typically the ultimate authority to declare those rules rests with the highest court of the state.[118] Therefore, the federal court ascertains state law in a conventional case by using any available information to determine how the highest state court would decide the issue at hand.[119] Of course, no difficulty arises if the highest state court has recently addressed the issue or if a state statute clearly controls it. In any other case, however, the federal judge must make an informed estimate of the result that a state court would reach in a similar situation.[120]

In an FTCA case in Arizona, the court can resolve the contributory negligence issue by adapting the conventional method of identifying state law. In Arizona, the state constitution and the courts have given juries the authority to determine the rights of the parties in cases involving contributory negligence.[121] The Arizona "law" of contributory negligence consists of the decisions of those juries. Therefore, the federal court can best ascertain and give effect to the Arizona law in a particular case by approximating the result that a jury would be likely to reach under similar circumstances. Such a result clearly would further the FTCA policy of making the government responsible for its conduct in the same manner and to the same extent as a private individual. Indeed, the more closely the legal consequences of contributory negligence in federal court resemble those in state court, the more effectively the federal court will be implementing the Arizona "law" as jury verdicts have defined it.[122]

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116. *See supra* notes 94-95 and accompanying text.

117. Unlike the problem of deciding which state laws apply in federal court, the problem of ascertaining state law on a given issue is similar in diversity litigation and in litigation arising from a federal statute such as the Federal Tort Claims Act. State policies and precedents, not federal ones, determine the nature of state law. When the problem is how to *implement* the state law in federal court, however, a Federal Tort Claims Act court has more flexibility than a diversity court, because the FTCA action is rooted in federal law. *See* Mishkin, *supra* note 60, at 808-10.

118. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

119. WRIGHT, *supra* note 4, at 373.

120. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring). *See generally* WRIGHT, *supra* note 4, at 370-77.

For examples of this process in FTCA cases, *see* Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978); Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974).

121. *See supra* notes 25-45 and accompanying text.

122. One might object that an attempt by a federal judge to reproduce the outcome of a state jury trial would be inconsistent with the Act's rejection of jury trials. Such an argument fails to consider the policies underlying the federal statute. Congress was concerned about excessive jury

The district court judge may refer to a variety of sources to determine how a jury would allocate the litigants' rights. Obviously some of the usual methods of ascertaining state law will not be very helpful to the court.[123] For example, Arizona appellate decisions will not provide any guidance, since Arizona law does not permit judges to decide when a contributorily negligent plaintiff may recover or the extent of his recovery. Similarly, the policies underlying the Arizona contributory negligence rule do not indicate how the rule should be applied in a particular case.[124] The court must look beyond conventional authorities in its search for Arizona law. It may refer to data that is not "legal" in the traditional sense, if such data reveals the result that an Arizona court likely would reach.[125] Possible sources of authority for a federal court in an FTCA case include the judge's own knowledge of how Arizona juries decide; a survey of jury verdicts in similar cases; and an advisory jury.

The federal judiciary in Arizona is well acquainted with the operation of Arizona law in practice, including the outcome of jury trials. Recognizing the familiarity of local judges with state law, the United States Supreme Court has shown special deference to state law determinations by lower federal courts.[126] If the language of state cases and statutes alone defined state law, no need for deference to local courts would exist, since any court could interpret the cases competently. Implicitly, the Supreme Court has acknowledged that the federal district judge may refer to her own experiences and insights in deciding how a state court would settle a state law issue.[127] A similar fund of experience could be tapped when the

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verdicts, that is, verdicts not justified by the law and the facts. *See supra* note 100 and accompanying text. In Arizona, however, the legislative and judicial policymakers have chosen jury verdicts as the legal standard of liability with respect to contributory negligence. Although a *particular* verdict may be "excessive," in light of the relevant facts, the average verdict defines the defendant's liability in the same sense as any other rule of contributory or comparative negligence. In light of the Act's overriding purposes, a procedural rule should not be construed to defeat this state-created measure of substantive liability.

123. *Bosch*, 387 U.S. at 464-65, sets forth some of the principles that have developed in diversity cases to guide the judge in weighing lower state court decisions.

124. Federal courts applying state law are enforcing the policies expressed in that law. The Tungus v. Skovgaard, 358 U.S. 588 (1959) (state law applied in an admiralty case); Note, *The Operation of Federalism in Diversity: Erie's Constitutional Basis*, 40 IND. L.J. 512, 538-39 (1965) (state law applied in diversity cases).

125. *See* WRIGHT, *supra* note 4, at 375. Professor Wright declares:

> The federal court must keep in mind, however, that its function is not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule that it believes the state court, *from all that is known about its methods of reaching decisions*, is likely in the future to adopt.

Id. (emphasis added).

126. *Bernhardt*, 350 U.S. at 204-05 (Court gives "special weight" to a finding of a Vermont district court judge regarding the effect of a contract arbitration provision under state law). *See* Mishkin, *supra* note 60, at 810.

127. Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951), is an interesting example of a federal court determining state law on the basis of its perception of how a state court would rule. The court characterized its task as "less philosophical and more psychological." Accordingly, it based its ruling on an assessment of the Massachusetts Supreme Judicial Court's conservative judicial philosophy. The court concluded that the Massachusetts court, emphasizing "precedent and adherence to the older ways," probably would not entertain the novel kind of policyholder's derivative suit that the plaintiff had brought in federal diversity court. *Id.* at 345-47.

In Yost v. Morrow, 262 F.2d 826 (9th Cir. 1959), a diversity case arising in Idaho, the federal court found no Idaho decisions addressing the question of law before it. Without citing authority,

issue is how an Arizona jury would determine the legal consequences of contributory negligence. The district court should be able to articulate reasons for a conclusion that a trial in state court probably would reach a certain result. Those reasons, however, need not be drawn from any formal source of state law.

A study of jury verdicts in Arizona cases involving contributory negligence could aid the federal court in ascertaining the Arizona law, although an accurate survey of the Arizona cases would be difficult to design. Available trial court records may not reveal all the facts relevant to the jury's verdict, and individual cases may not be susceptible to categorization and comparison. Any empirical data, however, would add to the limited knowledge of jury verdicts that the judge gains through his own experience. Perhaps the judge could approach the Arizona law of contributory negligence as he would approach a question of fact, weighing any "evidence" contributed by the parties according to its probative value and credibility.

The most effective means of implementing the Arizona law in FTCA cases would be through the use of an advisory jury.[128] A federal court may empanel an advisory jury at its discretion, in cases not triable of right by a jury, to assist the court in discharging its responsibilities.[129] In Arizona, an advisory verdict in an FTCA case would relieve the court of the burden of having to infer the result of a jury trial from past experience or other cases. The advisory verdict would reveal precisely what rights the parties would have in an Arizona state court.

Although the courts are not unanimous, most have held that advisory juries are proper in FTCA cases.[130] Some of these courts, however, have been reluctant to exercise their discretion to use an advisory jury. They reason that a court which accepts an advisory verdict contrary to the court's own finding abdicates its statutory decision-making responsibility.[131] Although that reasoning has some merit in a typical FTCA case, it should not preclude the use of an advisory jury in Arizona. In Arizona, an advisory jury would not merely find facts that the court also could find from the evidence presented at trial. Rather, the jury's advisory verdict

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the court assumed that Idaho would look to the neighboring state of Oregon for an appropriate rule. *Id.* at 828, n.3.

128. FED. R. CIV. P. 39(c) reads:

> Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United State provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

129. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2335 (1971).

130. Wright v. United States, 80 F.R.D. 478, 479 (D. Mont. 1978); Coffland v. United States, 57 F.R.D. 209, 210 (N.D. W. Va. 1972); Poston v. United States, 262 F. Supp. 22, 24 (D. Hawaii 1966), *aff'd on other grounds*, 396 F.2d 103 (9th Cir.), *cert. denied*, 393 U.S. 946 (1968); Schetter v. Housing Auth. of the City of Erie, 132 F. Supp. 149, 154 (W.D. Pa. 1955). *Contra* Honeycutt v. United States, 19 F.R.D. 229, 230 (W.D. La. 1956). *Honeycutt* has been criticized as a misreading of FED. R. CIV. P. 39(c). *Poston*, 262 F. Supp. at 23; WRIGHT AND MILLER, *supra* note 130, at § 2335, 128.

131. *Wright*, 80 F.R.D. at 480; *Poston*, 262 F. Supp. at 24 (quoting *Honeycutt*, 19 F.R.D. at 231).

would assist the judge in identifying the Arizona "law" of contributory negligence. The judge could comply with his statutory responsibility for deciding the case by treating the advisory verdict as another piece of "evidence" of the Arizona law.[132] In most cases, the court will not have to look beyond the advisory verdict to ascertain the rights of the parties. If, however, the evidence presented at trial does not support an advisory verdict, or if the verdict is markedly inconsistent with other jury verdicts in similar cases, the court remains free to modify or reject it.[133]

If the courts resolve several Arizona tort claims against the United States in favor of contributorily negligent claimants, a federal contributory negligence rule may begin to emerge. A uniform federal rule would not necessarily be inconsistent with the general FTCA principle that federal liability should be determined in accordance with state law. In any given case, a federal court sitting without a jury can only approximate the Arizona "law" of contributory negligence. A uniform rule for all Arizona cases would merely provide a simple way for the federal court to estimate the Arizona law. Such a rule obviously would be easier for the courts to administer and apply than an *ad hoc* process of deciding how an Arizona jury would decide in a particular case. For that reason, it may be desirable in practice to create a uniform rule.

IV. CONCLUSION

The Arizona contributory negligence doctrine could have a considerable impact on Federal Tort Claims Act litigation in Arizona. At present, a plaintiff's contributory negligence prevents him from recovering tort damages from the United States. If the federal courts recognize the Arizona contributory negligence rule, they may permit a plaintiff to recover despite his contributory negligence. The result will depend on the actual outcome of Arizona state court actions involving contributory negligence, not on the theoretical possibility of recovery by a contributorily negligent plaintiff. A finding that a significant number of contributorily negligent plaintiffs recover in state court should establish a similar right to recover from the federal government in FTCA actions.

To demonstrate his right to recover from the United States, a contributorily negligent plaintiff in Arizona will have to show that article 18, section 5 of the Arizona Constitution creates a substantive right of recovery by permitting the jury to determine the rights of the parties where contributory negligence is an issue. The plaintiff will have to show that the FTCA incorporates such state laws to determine the liability of the United States for the torts of its employees. He will have to argue that Congress did not intend the FTCA jury trial provision to defeat state-created substantive rights. Finally, the plaintiff will have to establish that the Arizona law of contributory negligence as juries have defined it would allow a person in similar circumstances to recover in Arizona state court.

This Note suggests several methods by which a federal court may be

132. *See Wright*, 80 F.R.D. at 480.
133. *See* WRIGHT & MILLER, *supra* note 130, at § 2335, 126.

able to resolve the conflict between Arizona substantive law and the FTCA denial of jury trial. Other solutions also may exist. The problem demands a creative solution which will remedy the present failure of the federal courts to recognize the rights of Arizonans injured by the negligence of federal employees.

ADDENDUM

After this Note was completed, the Arizona legislature enacted a comparative negligence statute. The statute was adopted as part of the Uniform Contribution Among Tortfeasors Act.[134] It combines an ordinary comparative negligence rule with the operative language of article 18, section 5 of the Arizona Constitution. The relevant text of the statute reads:

> The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury. If the jury applies either defense, the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of the injury or death, if any.[135]

In effect, the statute redefines "the defense of contributory negligence or of assumption of risk" in terms of comparative negligence.

The new comparative negligence legislation clearly establishes that contributorily negligent plaintiffs may recover in Federal Tort Claims Act cases in Arizona. This Note argues that a right to recover under Arizona law should be inferred from cases that allow the jury to find for the plaintiff despite his contributory negligence. The comparative negligence statute eliminates the need for such an inference. Arizona law now expressly sanctions jury verdicts in favor of contributorily negligent plaintiffs. The comparative negligence statute will apply in FTCA cases, under the general FTCA rule that state law defines the tort liability of the United States.

In specific cases, however, the new legislation may not solve the federal court's problem of defining and applying Arizona law. Several different interpretations of the statute are possible. Under the most reasonable interpretations, the jury still has some authority in a given case to determine whether or not the comparative negligence rule will apply. To the extent that juries retain their authority to decide the legal consequences of contributory negligence, the federal courts remain unable to ascertain the Arizona law. Thus federal judges still must try to decide FTCA cases according to how juries would decide them in Arizona state court.

Although the new statute prescribes a comparative negligence rule for cases involving contributory negligence, an interpretation of the statute

134. Ch. 237, 1984 Arizona Legislative Service 878-881 (West) (to be codified at ARIZ. REV. STAT. ANN. §§ 12-2501 to 2509) (effective August 30, 1984).

135. *Id.* at 880 (to be codified at ARIZ. REV. STAT. ANN. § 12-2505). The comparative negligence statute does not apply where the claimant has intentionally, willfully, or wantonly caused or contributed to his own injury.

giving every jury a duty to follow the comparative negligence rule would be inconsistent with the rule of *Layton v. Rocha.* The theory of *Layton* is that the Arizona Constitution requires that the jury decide what contributory negligence rule to apply. Consequently, juries since *Layton* have not been obligated to apply any particular contributory negligence rule. The "law" of contributory negligence can be defined only by reference to the results of jury trials. Even though the nominal Arizona law of contributory negligence is now a comparative negligence rule rather than the common-law rule, the jury's constitutionally-defined role has not changed. If the statute required the jury to apply a comparative negligence rule, it would return the jury to its pre-*Layton* role as factfinder. The Arizona Constitution, as *Layton* interprets it, does not permit such a limit on the jury's authority.

The statute can be interpreted in a manner consistent with the *Layton v. Rocha* rule. The statute provides that comparative negligence principles shall govern "if the jury applies [the defense of contributory negligence or assumption of risk]." The word "if" could mean that the jury can choose not to apply the "defense of contributory negligence," which the statute defines as comparative negligence. In that event, the plaintiff should be permitted to recover full damages despite his negligence. Article 18, section 5 may require even a broader result. The statute appears to compel the jury to reach a particular verdict—based on comparative negligence—once the jury decides to apply the "defense of contributory negligence." Whether such a rule is consistent with the constitutional command that contributory negligence shall be a question of fact for the jury in all cases, is not clear. If the jury cannot be directed to bar a contributorily negligent plaintiff from recovering damages, perhaps it cannot be directed to reduce his damages in proportion to his fault either.

If the new Arizona law authorizes juries to arrive at a result other than comparative negligence, then the Arizona contributory negligence rule is still defined by jury verdicts, and the federal courts should look to jury verdicts to determine the Arizona rule. The actual results of trials in Arizona state court will depend on the jury instructions that the courts develop to give effect to the new statute. If the statute and the constitution are held to require very permissive instructions to inform the jury of its discretion, comparative negligence may not become the universal Arizona rule. The methods described in this Note for ascertaining the Arizona law may then be useful in FTCA actions. On the other hand, most juries probably will apportion damages according to comparative negligence principles if the instructions do not encourage them to decide otherwise. In that case, the federal courts should apply the conventional comparative negligence rule.